

TAKEN FOR A RIDE

Migrant Workers in the U.S. Fair and Carnival Industry

AMERICAN UNIVERSITY
WASHINGTON
COLLEGE OF LAW



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About the Authors

American University Washington College of Law Immigrant Justice Clinic

The Immigrant Justice Clinic (IJC) is one of 11 law clinics within the Clinical Program at American University Washington College of Law (WCL). WCL's work on behalf of this report was undertaken primarily by students enrolled in IJC. The Clinical Program is designed to give students the opportunity to represent real clients with real legal problems, to handle litigation from beginning to end, to explore and address pressing legal issues with institutional clients, and to learn lawyering skills at both a practical and theoretical level. Student Attorneys enrolled in IJC work in teams under the supervision of a full-time faculty member and handle a broad range of cases and projects involving immigrant communities in the Washington, D.C. metropolitan area. IJC is structured so as to develop in students the skills and values needed to be effective immigrants' rights practitioners and respond to the unmet legal needs of the client community. As is true of this report, many of the matters handled by IJC reside at the intersection of immigration and employment law and have a transnational dimension. Other cases and projects handled by IJC have included the following: the representation of detained immigrants with criminal convictions; the representation of domestic workers seeking wage recovery and immigration relief; and advocacy work related to language access to social services in Washington, D.C.

Centro de los Derechos del Migrante, Inc.

Centro de los Derechos del Migrante, Inc. (CDM) is a transnational non-profit organization dedicated to improving the working conditions of migrant workers in the United States. Rachel Micah-Jones founded CDM in 2005 based on the premise that justice should transcend international borders and all workers should have access to justice, no matter their immigration status or location. In order to bring rights education and legal representation to workers in their home communities and in the U.S., CDM has offices in Mexico City and Oaxaca, Mexico, and in Baltimore, Maryland. With locations on both sides of the border, CDM has developed an innovative approach to legal advocacy and organizing that engages workers in their communities of origin, at the recruitment site, and at their places of employment in the U.S. Believing that the border should not be a barrier to justice, CDM ensures that when workers return home, they can enforce their rights.

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Executive Summary

Samuel Rosales Rios came to the United States from Mexico as a temporary worker under the H-2B guest-worker program¹ only to be treated by his employer not as a guest, but as a near-slave.² Samuel was permitted to enter the U.S. and work legally on a temporary seasonal basis for the employer who had sponsored his work visa, the operator of a Greek food stand at a state fair.³ Samuel and his coworkers were forced to work between 16 and 17 hours per day for many days in a row in temperatures that sometimes reached over 90 degrees Fahrenheit (over 30 degrees Celsius).⁴ The workers lived in poor housing and sometimes earned as little as \$1 USD (approximately 13 MXN) per hour,⁵ despite being promised an hourly rate of \$10 to \$12 USD (approximately 129 to 154 MXN)⁶ and decent living conditions.⁷ Samuel received so little pay that he could not afford to buy additional food to supplement the single meal his employer provided, leading him to suffer dehydration and hunger during his long shifts.⁸ After several days of sleeping in an overcrowded, bed-bug and flea-infested trailer, and without an adequate place to bathe, Samuel eventually sought treatment in an emergency room for dehydration and infections from bug bites.⁹

Samuel and his coworkers' experiences are illustrative of the appalling work conditions H-2B workers in the fair and carnival industry often face. These workers are vulnerable to unfair employment and labor practices in part because their visas only authorize them to work for the employer who sponsored them, and also because they often arrive in the U.S. with a debilitating pre-employment debt. Recent attempts to

enhance H-2B worker protections, while a step in the right direction, are currently stalled due to employer-driven litigation. As a result of inadequate government oversight and enforcement of existing laws, coupled with workers' limited access to exercise their rights by filing complaints regarding employment and health and safety violations, employers continue to bring workers to the U.S. and place them in deplorable work and living conditions with almost absolute impunity. While Samuel's employer faced legal consequences,¹⁰ many more violations of fair and carnival workers' basic rights are never reported or enforced. Too many workers like Samuel are taken for a ride.

Based on interviews with H-2B workers in Maryland, Virginia, and Mexico, this report sheds light on the abuses that fair and carnival workers face. Such abuses include deceptive recruitment practices and high pre-employment fees and costs; wage theft; lack of access to legal and medical assistance; substandard housing; and unsafe work conditions. The fair and carnival industry epitomizes what is currently most problematic with the H-2B temporary worker program, as employers are often able to mistreat their workers and claim exemption from basic worker protection laws with very little scrutiny. This report provides recommendations that would rectify H-2B worker mistreatment through means such as comprehensive immigration reform, agency rulemaking, and enforcement of existing laws. Fixing the H-2B program would not only help foreign temporary workers: all workers in the U.S. benefit when the rights of a specific group of workers are enhanced and enforced.



H-2B workers, uniformed in blue work shirts, ready the midway for a busy Saturday. Photo: Carson Osberg

Major Themes

This report highlights H-2B worker abuse in the fair and carnival industry, including:

- **Unfair recruitment processes.** Many fair and carnival workers are recruited from communities with high unemployment, poverty, and weak economies, resulting in a plethora of workers eager for opportunities to migrate for work. In a process driven by the employer and recruiter, H-2B workers have no real means to effectively counter being blacklisted or

discriminated against by an employer or labor recruiter. Additionally, the recruitment process often requires workers to incur substantial pre-employment and/or pre-departure costs, sometimes including unlawful recruitment fees. Furthermore, recruiters often provide workers with little or no information about the type of work they will perform or the actual conditions of their employment. The little information that is provided is frequently very different from the work conditions and jobs that workers encounter when they arrive.

- **Retaliation.** Workers risk retaliation from their employers if they complain about conditions or report abuses. H-2B workers in the fair industry specifically face blacklisting, threats, and employment termination. H-2B workers generally lose the right to remain in the United States when their employment ends because H-2B workers are only permitted to work for the employer listed on their visa. Once the employment relationship ends, H-2B workers are no longer authorized to work or remain in the U.S., which discourages them from complaining about unlawful or hazardous working conditions and from leaving unscrupulous employers, especially if they have incurred pre-employment debt. H-2B workers find themselves in an imbalanced employment relationship in which the employer holds much power over a temporary and vulnerable labor force.
- **Wage and hour abuses.** Low wages and long, arduous hours are the norm for most H-2B workers employed in the fair and carnival industry. The majority of workers interviewed for this report were employed as ride operators whose employers paid them in weekly lump sums regardless of how many hours they were made to work or the minimum wage in the state in which they were working. These workers often worked more than 80 hours a week for a flat weekly rate of approximately \$300 USD (approximately 3,855 MXN).¹¹ As a result of this practice, many workers did not receive even the federal minimum wage of \$7.25 USD (approximately 93 MXN) per hour,¹² much less the overtime rate,¹³ the occupation's prevailing wage,¹⁴ or the wage promised at recruitment. This means that those traveling fair workers earn at least \$400 USD (5,140 MXN) less per week than they are owed for an 80-hour workweek based on federal wage laws.¹⁵ In addition to being cheated out of their wages, workers are often denied rest and meal breaks during the day.
- **Serious health and safety risks.** The long work hours and lack of breaks result in physical and mental exhaustion. Ride operators lift and assemble heavy equipment, often without training or protective gear and sometimes in inclement weather. Workers frequently report working from significant heights to set up amusement rides without harnesses or helmets, and on-the-job injuries are not uncommon. When workers become sick or injured, many are unable to access proper medical care due to limited time off and a lack of access to transportation.
- **Lack of access to workers' compensation.** When H-2B workers are injured on the job, they are often deprived of workers' compensation because federal law regulating H-2B workers does not require employers to provide insurance coverage. Rather, state law determines whether an employer is required to cover workers injured in a given state. As a result, workers, especially those who cross through many states during a regular fair and carnival season, often face complications in obtaining workers' compensation for work-related injuries. Additionally, some injuries from repeated strenuous lifting may not fully present until workers have returned home, creating additional barriers to accessing the necessary medical examinations or being physically present for workers' compensation hearings. When a worker dies from work-related injuries, family members located outside of the U.S. face significant barriers in collecting benefits.
- **Isolated and substandard living conditions.** H-2B workers in the fair and carnival industry typically live in trailers next to fairgrounds, which are often in remote areas. Isolated living conditions render H-2B workers largely unable to access assistance from advocacy groups providing education to low-wage workers about their rights. H-2B fair and carnival workers often live in substandard and overcrowded housing prone to insect infestations and the



Necessary protections for H-2B workers will lead to a brighter future. Photo: Xavier E. Albán

spread of disease. Housing frequently lacks refrigeration or cooking facilities for workers to prepare their own food, and often lacks adequate bathing and waste facilities.

- **Limited Access to Justice.** Fair and carnival workers travel great distances over the course of the fair season. Consequently, workers who suffer workplace harm such as minimum wage violations or injuries have difficulty seeking redress. Because the governing law varies depending on what state workers are in, it is difficult for H-2B workers to familiarize themselves with their rights or to acquire information about the organizations or entities that might be able to assist them in asserting those rights. Some H-2B workers are not even aware that they have the right to fair pay, safe

work environments, and freedom from discrimination, among other rights. Moreover, under current law, recipients of funds from the Legal Services Corporation (LSC) are prohibited from using such funds to provide legal assistance to most H-2B workers,¹⁶ which significantly diminishes the pool of advocates available to help these workers.¹⁷ If H-2B workers in the fair and carnival industry obtain legal representation, their transience often prevents meaningful access. Furthermore, once their certified employment period ends, H-2B workers must leave the U.S., which poses additional barriers to accessing justice, including the inability to return to the U.S. to participate in legal proceedings.

Key Recommendations

Congress Should:

- Enact retaliation protections for workers who report abuse.
- Enact legislation to hold employers strictly liable for all recruitment fees charged to workers.
- Permit H-2B workers to expeditiously request a change of employer.
- Require that employers reimburse H-2B workers for all visa and travel costs.
- Extend federally funded legal services to all H-2B workers.
- Remove any exemptions from minimum wage, overtime, and recordkeeping provisions for amusement industry employers from federal labor laws.
- Enact legislation to hold employers, recruiters, and their agents jointly and severally liable.
- Amend federal anti-discrimination laws to clearly articulate the available protections for migrant workers, both during the recruitment process and while employed in the U.S.
- Require that job orders be treated as enforceable contracts.

The Department of Labor Should:

- Enforce employers' reimbursement of all pre-employment expenses within the first work-week to the extent that they reduce workers' pay below the highest applicable minimum wage.
- Ensure that anti-retaliation provisions are enforced.
- Forbid the charging of recruitment fees by U.S. employers, their agents or associates, and subcontractors of the employer's agents and investigate the charging of illegal fees.
- Issue a memorandum reminding all fair and carnival employers that they must keep payroll records, pay overtime wages, and pay the highest of the federal minimum wage, prevailing wage, or state minimum wage. The memorandum should remind fair and carnival employers that it is their burden to prove any exemption to these laws.
- Conduct inspections of H-2B fair employers' payroll and average receipts records to ensure compliance with applicable minimum wage and prevailing wage standards.
- Issue rules related to training, breaks, and safety equipment to protect the health and safety of fair and carnival workers.



Many H-2B workers leave their hometowns and families behind, sometimes for most of the year, in search of employment. Photo: Rachel Nathanson

Profile of an H-2B¹⁸ Worker in the Traveling Fair Industry

In his home country of Mexico, Nicolas¹⁹ owns and operates a small storefront where he sells soap, toilet paper, tomatoes, and other everyday items. But from 2008 to 2010, Nicolas spent most of the year in the U.S. on an H-2B visa working for a prominent traveling fair company. In this capacity, Nicolas was responsible for operating, assembling, and disassembling a roller coaster ride. Every time the fair company left one fair site and arrived at a new one, Nicolas had to climb up the side of the approximately 130-foot-tall ride in order to deconstruct and construct it again. Nicolas' employer did not give him any formal training or protective gear for this task. Once, his boss cursed at him and made him disassemble the ride in the rain, despite Nicolas' protests that it was too dangerous. His employer also never formally instructed him on how to operate the roller coaster safely. Because Nicolas was one of the only workers who knew how to operate the ride, he was allowed only infrequent breaks. Whenever he was hungry, he had to purchase expensive food from a nearby fair stand and eat while he took tickets and operated the ride.

After working a 12- or 13-hour day, Nicolas returned to a trailer he shared with six other workers. The trailer had electricity and one bathroom, but no kitchen or hot water. Nicolas did not even have a bed to look forward to at the end of his long workdays. Rather, his small room included a bedframe with wooden slats, no mattress, and no sheets. On one occasion, the trailer broke down, so Nicolas and his coworkers were forced to sleep under the rides for several days until the trailer was repaired.

In addition to enduring deplorable employment and housing conditions, Nicolas and his H-2B coworkers also suffered poor treatment from their boss. Their employer withheld their passports for approximately two weeks upon their arrival in the U.S., Nicolas believes as a means of preventing them from fleeing. Additionally, Nicolas and his H-2B coworkers were forbidden from leaving the fairgrounds during the first month of their employment. Their employer berated and called them derogatory names if they did not meet the employer's expectations. Nicolas and his coworkers did not feel like they could complain about their work or living conditions because their ability to remain and work in the U.S. hinged on their H-2B visas and therefore, their employer.

Nicolas was paid a flat rate of \$275 USD (approximately 3,534 MXN)²⁰ per week, regardless of the number of hours he worked. As a result, his hourly rate amounted to a little over \$3 USD (approximately 38 MXN) per hour.²¹ He earned less on days when he worked longer hours in preparation for the company's departure to a new location, packing up the rides after a full day of work. On one occasion, Nicolas was not paid for an entire week's worth of work when the owner blamed Nicolas and his coworkers for having to undergo a site inspection by the city inspector. Nicolas' weekly pay was not documented by a pay stub, fell far short of the minimum wage, and did not include overtime compensation. Nicolas was never reimbursed any of the 4,500 MXN (approximately \$350 USD) in fees he had paid the recruiter in Mexico.

Introduction

Each year, migrant workers, primarily from small towns in Mexico, are recruited by a small number of labor agents to work at fairs and carnivals during the fair season, which often lasts up to nine months a year. These workers typically come to the U.S. with H-2B visas. The H-2B visa program, a descendant of the exploitative and highly criticized “Bracero” program,²² allows for the temporary admission of workers to the U.S. to complete non-agricultural work when U.S. workers are unavailable or unwilling to fill those jobs.²³ Each year, thousands of workers travel to the U.S. on H-2B visas to fill a need for a “stable and reliable workforce,” with approximately 5,000 of those working in the fair and carnival industry.²⁴ Fair and carnival companies book dozens of fairs in a given season, traveling throughout the continental U.S. with their equipment and workers in tow. These fair and carnival industry companies, who boast significant political clout and successful lobbying efforts in Washington, D.C.,²⁵ often rely primarily on migrant workers to engage in the physically demanding, dangerous, and time-intensive work that enables their fairs to run smoothly and profitably.²⁶

In theory, the H-2B program creates a mutually beneficial relationship that allows employers to supplement a shortage of available domestic labor with workers eager to work at U.S. wages. In practice, however, H-2B workers often find themselves in an imbalanced relationship in which the employer holds much of the power, leaving workers vulnerable to workplace abuses with little recourse for enforcing even their most basic workers’ rights. Some of these fundamental rights include safe work environments, adequate job training to ensure workplace safety, access to medical care and workers’ compensation, livable housing conditions, just compensation, reasonable work hours, and fair treatment under existing laws. H-2B workers are particularly vulnerable to retaliation and threats of retaliation because their visas bind them to the employer who sponsored them.

Compounding the issues facing H-2B workers is the Department of Labor’s inadequate monitoring of the H-2B program and sporadic enforcement of existing wage and hour laws. Recognizing the challenges and weaknesses of the H-2B program, in 2012, the Department of Labor (DOL) issued new regulations (2012 H-2B Regulations) in an attempt to strengthen worker protections.²⁷ H-2B employers, who have generally resisted efforts to enhance worker protections, have been part of the opposition to the new regulations, which are currently stalled from going into effect by ongoing federal litigation initiated by employer associations.

In order to shed light on the abuses facing H-2B workers in the fair and carnival industry, American University Washington College of Law’s Immigrant Justice Clinic and Centro de los Derechos del Migrante (CDM) collaborated on this project. Over the past years, CDM has received complaints through its Migrant Defense Committee from H-2B workers describing abuses of employment rights in the fair and carnival industry. Using interviews with H-2B workers in Maryland, Virginia, and Mexico, *Taken for a Ride: Migrant Workers in the U.S. Fair and Carnival Industry* describes the conditions H-2B workers often endure in the traveling fair and carnival industry and reveals violations of the workplace rights of these temporary workers.

Part I of this report examines the H-2B temporary worker program and reveals how the fair and carnival industry relies on H-2B workers. Unlike many U.S. workers, H-2B workers are willing to travel with the fair for the entire season and are more likely to remain with their employers given that the terms of their visas only allow them to remain with the employer listed on their visa or to return home. Part I also highlights the size and political influence of the fair and carnival industry, focusing on the major employers and their well-organized lobbying efforts. Part II of this report



Behind the smiles and fun at the fair, carnival and fair companies require their employees to work long, arduous hours. Photo: Carson Osberg

describes the high rates of unemployment and poverty prevalent in the small cities and towns in the largely agricultural areas of Mexico, where most fair and carnival H-2B workers are recruited. This economic pressure facing H-2B workers, when coupled with the current laws and practices of the H-2B worker recruitment and visa application processes, places these workers' fates in the hands of a small number of recruiting agents.

Part III addresses wage and hour abuses often experienced by H-2B workers, including failure to pay at the wage rate promised during recruitment, minimum wage and overtime pay violations, and barriers to justice for H-2B workers. Part III also discusses how the lack of government oversight and enforcement of

existing laws allows employers to mistreat their workers with virtual impunity. Part IV of the report explores common workplace health and safety violations in the fair and carnival industry, as well as the discrimination and poor housing conditions these H-2B workers face. Part IV also discusses employers' failure to provide H-2B workers with adequate training and sufficient access to medical assistance and treatment of injuries, as well as the obstacles injured H-2B workers face in receiving workers' compensation. Part V examines the role that employer retaliation and threats of retaliation serve to further control an already vulnerable population. The report concludes by making specific federal and state policy recommendations to improve the lives and working conditions of H-2B workers in the fair and carnival industry.

The Traveling Fair Industry and H-2B Workers

“They treat us like dogs.”

— *H-2B Worker Jordan*²⁸

“This is the first time I’ve come to work in the fairs. I came to the U.S. and worked in construction for the last five years. Here [in the fairs], the work is very hard, and they don’t pay us enough. I’ve been here for a month, and I’m definitely not coming back next year to work in the fairs. I’m going to try to go back to working in construction or a factory job next year. We have to work very hard setting up and taking down the rides. Sometimes we work 20-hour days, and even if it’s raining...there’s no time to rest doing this kind of work.”

— *H-2B Worker Tomas*²⁹

Annual fairs and carnivals typically conjure up happy memories for communities across the U.S. Traditionally operated by small, family-run businesses, they are often a source of local pride and entertainment.³⁰ But times have changed, and larger national corporations have replaced mom-and-pop businesses in the traveling fair and carnival industry.³¹

These changes in fair company operations appear to coincide with fair industry reliance on H-2B workers, who are willing to travel along with the fairs for many months on end. Since the 1970s, the traveling fair and carnival industry has employed internationally

recruited temporary workers for up to nine or 10 months per year in what are supposed to be seasonal positions.³² The H-2B visa program allows the fair industry to fill grueling, low-paid positions that require constant travel with temporary workers. This labor-intensive industry requires thousands of workers to assemble, operate, and disassemble carnival rides and concession stands.³³ As of the latest 2012 data, amusement park workers, some of whom are employed by traveling fair and carnival operators, constitute the third largest H-2B visa-holder occupation, after positions in landscaping and forestry.³⁴

“Inadequate oversight of the H-2B program and enforcement of wage and hour laws is a significant problem for H-2B workers, who are vulnerable to employment-related abuses.”



Vermont State Fair, 1939 Photo: Library of Congress Prints and Photographs Division, available at <http://hdl.loc.gov/loc.pnp/fsac.1a33919>

Inadequate oversight of the H-2B program and enforcement of wage and hour laws is a significant problem for H-2B workers, who are vulnerable to employment-related abuses.³⁵ Additionally, the fair industry often invests significant resources to lobby lawmakers to keep minimum wages in the industry low and to increase the number of workers authorized to come to the U.S. under the H-2B program.³⁶ The fair industry has even formed a national trade association, the Outdoor Amusement Business Association (OABA), which

represents amusement operators by lobbying for policies affecting the industry as a whole.³⁷ Recently, OABA supported efforts to stall the implementation of new DOL H-2B regulations that would improve aspects of the H-2B program that leave workers vulnerable to employer misconduct.³⁸ In doing so, OABA claimed that the H-2B program was “under attack” by the Obama Administration, DOL, labor unions, and the agenda of “pseudo ‘worker’s [sic] rights’ groups.”³⁹

H-2B Worker Program

Governor Andrew Cuomo, former New York Attorney General, on the \$325,000 settlement agreement resulting from an investigation into a carnival operator's wage abuse of, substandard living conditions for, and discrimination against its H-2B workers:

"This company not only denied its employees the pay they had earned—but abused and manipulated a system in place to help foreign-born workers build lives for themselves and their families... [t]hey [the company] consistently violated this state's civil and labor rights and exploited the most vulnerable in their workforce. Today's agreement will deliver welcome restitution to the workers who were cheated, as well as send a message to other employers statewide that abuses of their employees come with a price tag."⁴⁰

The H-2B program, a descendant of the "Bracero" program,⁴¹ allows for the temporary admission of workers to the U.S. to complete seasonal, non-agricultural work when U.S. workers are unavailable or unwilling to fill those jobs.⁴² The H-2B worker program was created in 1986 with Congress' passage of the Immigration Reform and Control Act (IRCA).⁴³ IRCA amended the Immigration and Nationality Act (INA) to divide the existing H-2 nonimmigrant visa category in two, creating the H-2A temporary agricultural and H-2B temporary non-agricultural visa programs.⁴⁴ Over the years, the program has changed and evolved to meet the growing demand for temporary foreign national workers. To qualify for H-2B workers, the employer's labor need must typically not last longer than ten months, and employers must reapply for the visas each year.⁴⁵ Each

worker's visa is tied to the requesting employer, and the worker may not initiate a visa application or use the visa to work for any other employer.⁴⁶ The INA limits to 66,000 the number of H-2B visas that can be issued each fiscal year.⁴⁷ The H-2B visa application process is described in detail in Appendix A.

Each year, thousands of H-2B workers,⁴⁸ primarily from small Mexican towns with few economic and employment opportunities, are recruited by a small number of labor agents to work at fairs and carnivals during the fair season, which often lasts up to nine months a year. While the H-2B program enables U.S. businesses to meet their seasonal labor needs with a "stable and reliable workforce,"⁴⁹ a lack of oversight and enforcement of H-2B regulations and wage and

hour laws allows employers virtually unchecked ability to take advantage of and abuse workers. In 2009, the Department of Homeland Security (DHS) delegated enforcement of compliance with H-2B petition and temporary labor certification requirements to DOL.⁵⁰ Both the DOL Employment and Training Division (ETA) and the DOL Wage and Hour Division (WHD) play a role in overseeing and administering the H-2B program. The lack of adequate monitoring of the H-2B program is particularly concerning given documented instances

of forced labor and human trafficking of H-2B workers.⁵¹ Recognizing the challenges and weaknesses of the H-2B program, in 2012, DOL issued new regulations in an attempt to strengthen worker protections.⁵² The implementation of these regulations is currently stalled by ongoing federal litigation initiated by employer associations. If implemented, the new regulations would extend basic protections to the workers that many of America's industries rely on.

DOL's 2012 H-2B Regulations & Federal Litigation

On February 21, 2012, DOL issued new H-2B program regulations that provide enhanced worker protections.⁵³ The implementation of the 2012 H-2B Regulations was stalled by a lawsuit in federal district court the day before they were to go into effect.⁵⁴

The 2012 H-2B Regulations provide modest, though much needed, worker protections that address the types of problems plaguing the H-2B program by promoting transparency in the recruitment process and increasing employer accountability and worker protections.⁵⁵ The 2012 H-2B Regulations would prohibit the imposition on H-2B workers of pre-employment costs such as recruitment fees and visa and travel expenses that often cause workers to go into considerable debt.⁵⁶ Such pre-employment debt effectively forces H-2B workers to accept unlawful working conditions. Moreover, the 2012 H-2B Regulations would require H-2B employers to provide each worker with the job order in a language the worker understands and to pay workers at least three-fourths of the hours promised for each 12-week period.⁵⁷ The 2012 H-2B Regulations also require H-2B employers to keep accurate records of wages paid, hours worked, and where the work was performed; to provide workers with an earnings statement on or before payday; and to pay H-2B workers at least every two weeks.⁵⁸ Finally, the 2012 H-2B Regulations strengthen workers' ability to voice concerns about workplace abuses and exercise their rights without the fear of employer retaliation.⁵⁹ Specifically, the 2012 H-2B Regulations prohibit employers from intimidating, threatening, restraining, coercing, blacklisting, discharging, or discriminating against H-2B workers.⁶⁰

Violations of the 2012 H-2B Regulations could result in civil monetary penalties equal to back wages, prohibited fees, and improper deductions or \$10,000 USD (approximately 128,500 MXN), whichever is less.⁶¹

There had been no earlier controversy with regard to DOL's rulemaking authority over the H-2B program, including the H-2B regulations published during the Bush Administration (2009 H-2B Regulations). Yet, in the litigation surrounding the 2012 H-2B Regulations, the employer organizations and U.S. Chamber of Commerce question DOL's rulemaking authority with regard to the H-2B program.⁶² They specifically object to the three-fourths wage guarantee, the tracking of the hours worked and wages paid, and the reimbursement requirement for visa and travel expenses.⁶³

The district court's decision is currently on appeal before the Eleventh Circuit Court of Appeals.⁶⁴ If reversed, the injunction will be lifted.

Reliance on H-2B Worker Labor in the Fair Industry

The nostalgic “mom n’ pop,” family-owned and operated carnivals of the past have mostly given way to larger companies operating in multiple states or regions.⁶⁷ North American Midway Entertainment (NAME), Ray Cammack Shows, Butler Amusements, Wade Shows, Reithoffer Shows, Mid-America Shows Delaware, and Astro Amusement Co. are among the largest H-2B traveling fair and carnival employers (see Table 1).⁶⁸ In the 1970s, these operators began to rely heavily on H-2B workers to enable them to operate on a national scale.⁶⁹ In fiscal year 2011 alone, the amusement industry (comprised of more than just traveling fair and carnival employers) obtained certification to bring more than 5,000 workers to the U.S. via the H-2B program.⁷⁰ In fact, NAME was the fifth largest H-2B employer during most of fiscal year 2012.⁷¹ In fiscal

year 2011, the top seven fair and carnival companies requested H-2B visas for an average of more than 266 workers each (see Table 1).⁷² These seven operators employed more than a third of the total H-2B workers in the amusement industry.⁷³

Larger fair companies, like the ones employing H-2B workers, compete for lucrative contracts with state fair boards around the country.⁷⁸ An example of such a contract was negotiated in 2011 between NAME and the Kansas State Fair Board. The contract appeared to have provided that NAME contribute \$10,000 to the fair for “mutually agreed-upon projects,” on top of an annual flat fee of \$40,000.⁷⁹ This “pay-to-play” contract system makes it harder for smaller companies to compete with larger corporations that can afford to pay large flat fees. NAME travels over two million miles every year, providing its services to fairs and carnivals in more than 145 communities in 20 states and four



Employers rely on H-2B workers to operate the various rides providing amusement to families at fairs.

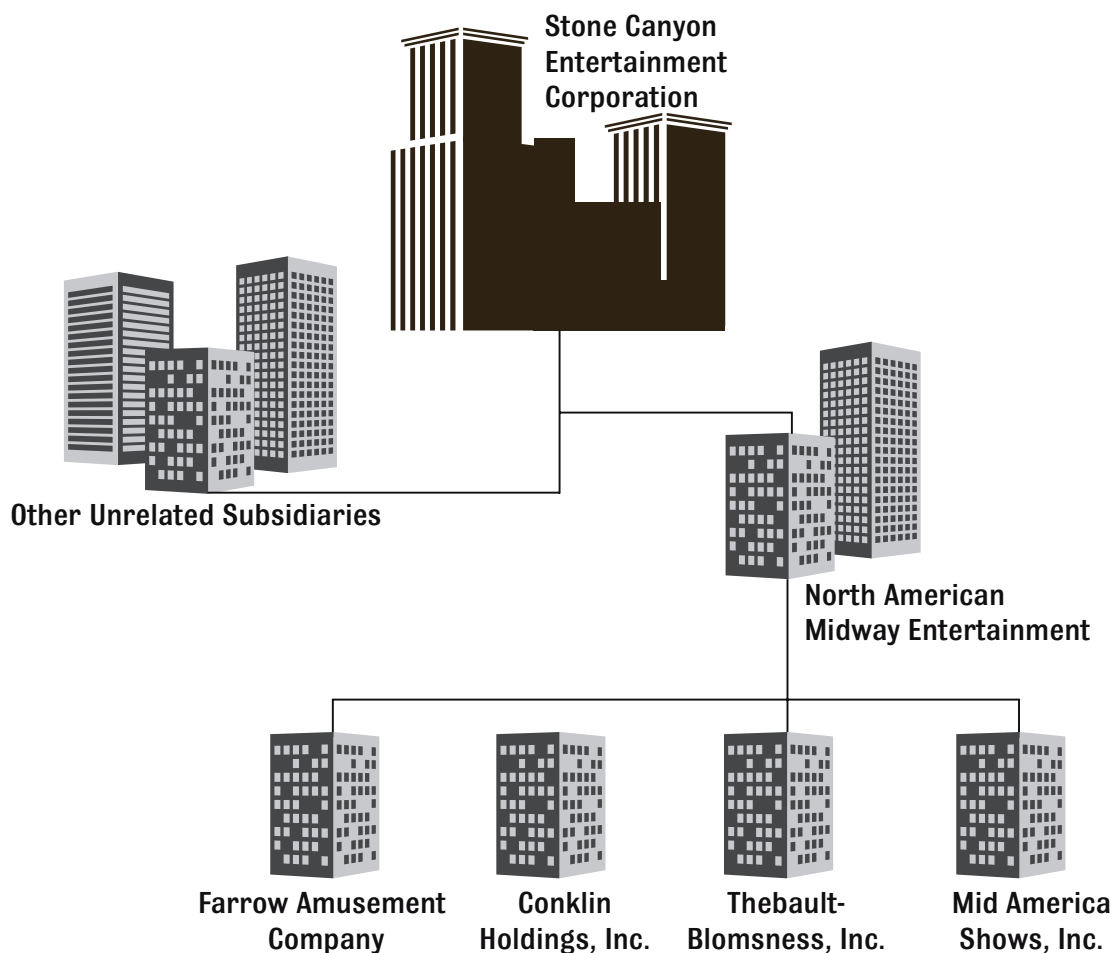
Photo: Carson Osberg

“Basically, the carnivals took people nobody would... [w]e had to employ the unemployable.”

— *Butler Amusements Manager Kurt Vomberg*, describing the typical fair and carnival employee before labor recruitment from Mexico.⁶⁵

Worker Story: Domingo⁶⁶

Domingo reported that he typically worked 12 to 16 hours a day, and 16 to 24 hours on days they had to tear down and reconstruct the rides. He typically received only one half-day off per week. Domingo assembled and disassembled rides, strung electric cables, cleaned the fairgrounds, picked up garbage, changed light bulbs, painted rides, washed company trucks, and cleaned the owner’s trailers and the surrounding area. For this, Domingo was paid a flat weekly rate of \$300 USD (approximately 3,855 MXN). Sometimes, when there was no fair work, Domingo and the other workers were sent to the owner’s ranch to work. Each week, the workers got a half-day off to rest.



NAME's current corporate structure illustrates the demise of "mom n' pop" carnival companies of the past.

Canadian provinces.⁸⁰ NAME, along with many of the other larger traveling fair vendors, is also a member of eight national and international associations, including OABA.⁸¹ These associations aim to further fair and carnival operator interests when there is proposed legislation or regulations involving federal minimum wage and hour requirements, regulation of interstate commerce, and foreign national workers.⁸²

Interstate Routes

During a single season, fair companies travel interstate circuits through dozens of communities in multiple states. Employers often participate in a wide range of fairs and carnivals from large state fairs to small town carnivals. Often, workers do not know where they are and do not have connections in the communities where they work. In addition, they are dependent on their employers for transportation and receive limited time off from work.

Not only is the constant travel grueling for fair workers, it also makes fair and carnival vendors a moving target for state and federal investigators. The transient nature of the fair industry is largely incompatible with the monitoring mechanisms set up by DOL to ensure compliance with the H-2B program's requirements. For example, DOL requires that employers requesting H-2B workers list on their labor certification applications the areas where workers will perform the temporary labor.⁸³ Yet fair and carnival workers are constantly moving from one state to the next throughout their time in the U.S., and these states are often not listed on the labor certification application (see Appendix B). For example, Ray Cammack Shows operates in states from California to Nebraska,⁸⁴ while Reithoffer travels up the East Coast from Florida to Vermont.⁸⁵ NAME operates from Florida to Massachusetts, and sometimes as far west as Kansas.⁸⁶ Based on DOL Office of Foreign Labor Certification (OFLC) data, it appears that fair

Table 1: H-2B Worker Certifications of the Largest Traveling Fair and Carnival Operators

Employer	H-2B Workers Certified by Department of Labor (Fiscal Year 2010)⁷⁴	H-2B Workers Certified by Department of Labor (Fiscal Year 2011)⁷⁵
North American Midway Entertainment (NAME) ⁷⁶	780	729
Ray Cammack Shows	502	340
Butler Amusements	241	247
Wade Shows	440	216
Reithoffer Shows	141	123
Mid-America Shows Delaware	0	110
Astro Amusement Co. ⁷⁷	100	100



Fair companies travel from state to state and city to city offering family fun and requiring much from their workers, who are the backbone of these operations.

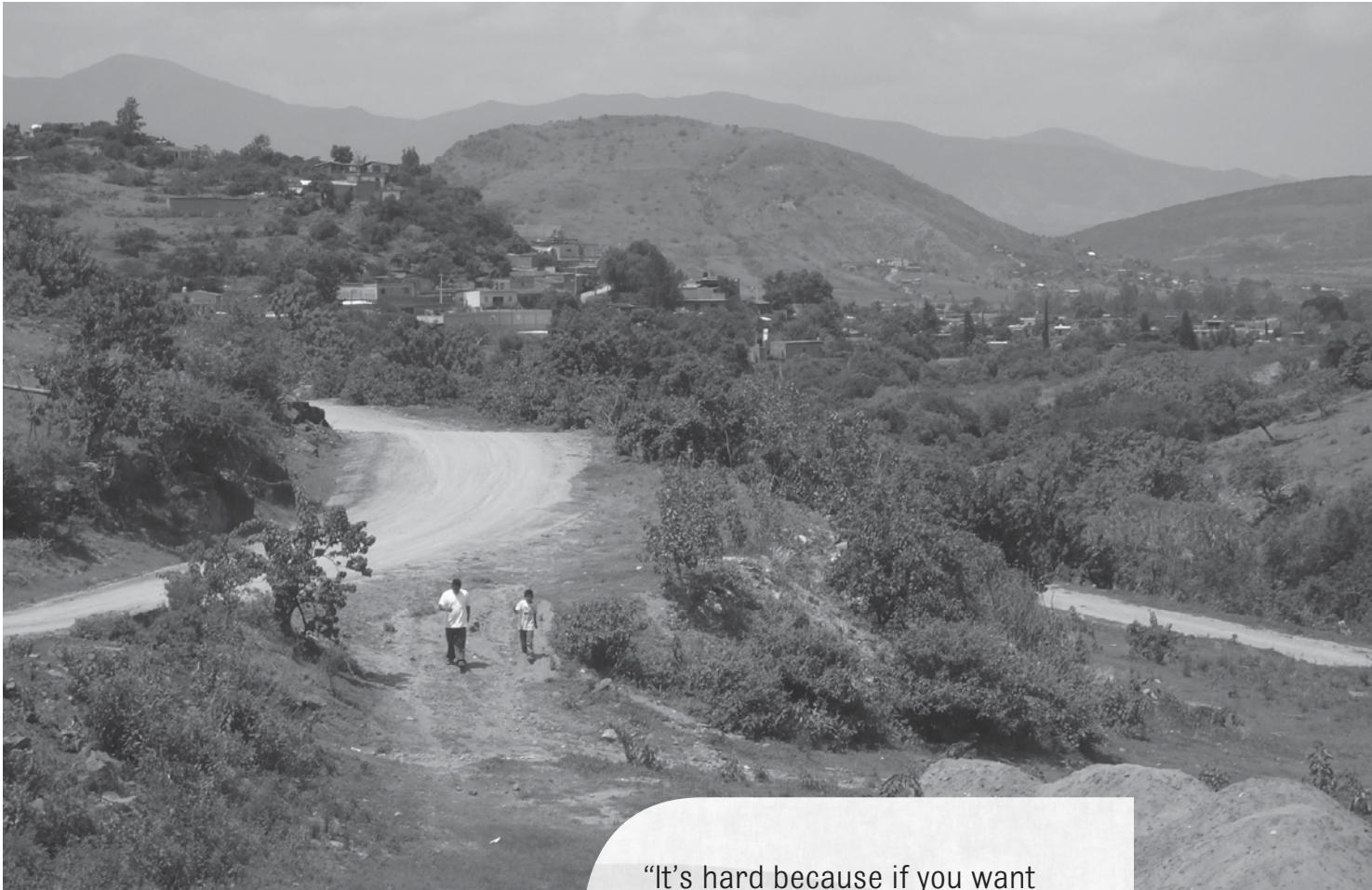
Photo: Carson Osberg

companies sometimes do not request certification for workers in each state where they operate.⁸⁷

The transient nature of traveling fairs makes it difficult for state agencies to monitor and enforce employment-based protections. Additionally, H-2B

workers' unfamiliarity with the U.S. legal system and specific state laws further complicates the grievance process. Importantly, employment law differs from state to state, and a violation in one state may not be a violation in another state.

Labor Recruitment for Traveling Fairs and Carnivals: Country Conditions and Industry Practices that Disadvantage H-2B Workers



The combination of high recruitment fees, visa and travel costs, and the difficulty of earning a living in Mexico makes workers more willing to endure the abuses of the fair industry.

Photo: Rachel Nathanson

“It’s hard because if you want to build something, your own house or whatever, you have to go to USA. Without work there [in Mexico],...[w]e can’t even build our own houses.”

— Pablo Juarez Mendoza, a potential H-2B worker⁸⁸

“Workers who protest or complain about working conditions can easily be targeted for retaliation, including denial of employment opportunities in future seasons.”

Fair and carnival workers are mostly recruited from communities in Mexico where unemployment, poverty, and weak economies susceptible to volatile agrarian seasons create a vulnerable workforce.⁸⁹ Worker recruitment for fair and carnival employers is carried out by a small number of agents,⁹⁰ and generally, a single recruiter determines which individuals in a particular community will be hired for H-2B jobs.⁹¹ Because the recruiter and employer control the visa petitioning and recruitment processes, workers and their families tend to suffer great uncertainty regarding their prospective employment. Workers who protest or complain about working conditions can easily be targeted for retaliation, including loss of employment opportunities in future seasons.⁹² Additionally, the recruitment process often requires workers to incur substantial pre-employment costs that often go unreimbursed by employers. Nonetheless, the economic circumstances in which potential workers live compel them to vie for fair and carnival jobs available through the H-2B program.

Economic Conditions in Mexico

Many fair and carnival workers are recruited from small cities and towns in largely rural and agricultural areas of Mexico. The Mexican states of Veracruz, Zacatecas, Nuevo Leon, Puebla, and Durango are some of the largest worker recruitment centers. Although these states span central Mexico, they are linked by high rates of migration, unemployment, poverty, and economies dominated by agriculture.⁹⁴

Unemployment and under-employment are the primary reasons for migration from rural Mexico. Mexico's extremely low minimum wage contributes to this pressure to migrate.⁹⁵ In 2011, the minimum daily wage, determined by geographic zone, was 59.82 MXN (approximately \$4.37 USD) in Baja California, Mexico City, the State of Mexico, and large cities; 58.13 MXN (approximately \$4.24 USD) in Sonora, Nuevo Leon, Tamaulipas, Veracruz, and Jalisco; and 56.70 MXN (approximately \$4.14 USD) in all other municipalities.⁹⁶ As a result of low wages and a scarcity of jobs, 60 percent of Mexicans living in rural areas, where most

“We all need to work...[w]e all have families.”

— Mexican traveling fair worker Antonio Mendez, explaining the pressure facing him and other workers hoping to obtain H-2B visas to work in the U.S.⁹³



A Mexican village some H-2B fair workers call home. Photo: Carson Osberg

H-2B workers are recruited, lived below the national poverty line in 2008,⁹⁷ and 51.3 percent of all Mexicans lived below the national poverty line in 2010.⁹⁸

For example, one small sending community in the Mexican state of Veracruz has been a key recruitment center for fair and carnival workers for more than a decade. The city's municipal government reports that 80 percent of its economy is agricultural, with 50 percent of the workforce engaged in the city's production of its primary agricultural products, citrus fruits, coffee, and bananas.⁹⁹ The competition for agricultural jobs is stiff, however, so workers are unable to generate income sufficient to support their families.¹⁰⁰ The coffee industry provides some manual labor jobs during the harvest season, but workers often earn as little as \$70 USD (approximately 900 MXN) for a week of work.¹⁰¹ Therefore, incentives to migrate are especially high.

Fair and carnival workers also travel to the U.S. from other Mexican states such as Zacatecas and Durango. In Zacatecas, the major industries are agriculture and animal husbandry.¹⁰² Agriculture and livestock are also important industries in Durango, and there is an active silver and gold mining industry as well.¹⁰³ Employment in these largely manual labor industries is susceptible to the country's often-volatile economic state. In 2011, the states of Durango and Zacatecas experienced some of the highest unemployment rates in Mexico.¹⁰⁴ Given the limitations in educational and income-generating opportunities for individuals in these Mexican states, workers are eager to find employment in the U.S., especially when it involves lawful admission into the country and work authorization. Workers often send, or intend to send, their earnings home to family in Mexico.¹⁰⁵

H-2B Worker Recruitment

Worker Story: Fabricio¹⁰⁶

Fabricio's uncles told him of their work with the fairs in the U.S. and then connected him with their recruiter. However, they left out the exploitation that often accompanies work in the fairs. When Fabricio contacted the recruiter, the recruiter asked him if he was ready to work. Two days later, he was told to go to the U.S. consulate for an interview with enough money for his trip. Fabricio remembers seeing signs at the consulate stating that H-2B workers are supposed to earn \$8 USD (approximately 102 MXN) per hour. However, he actually earned approximately half that amount.

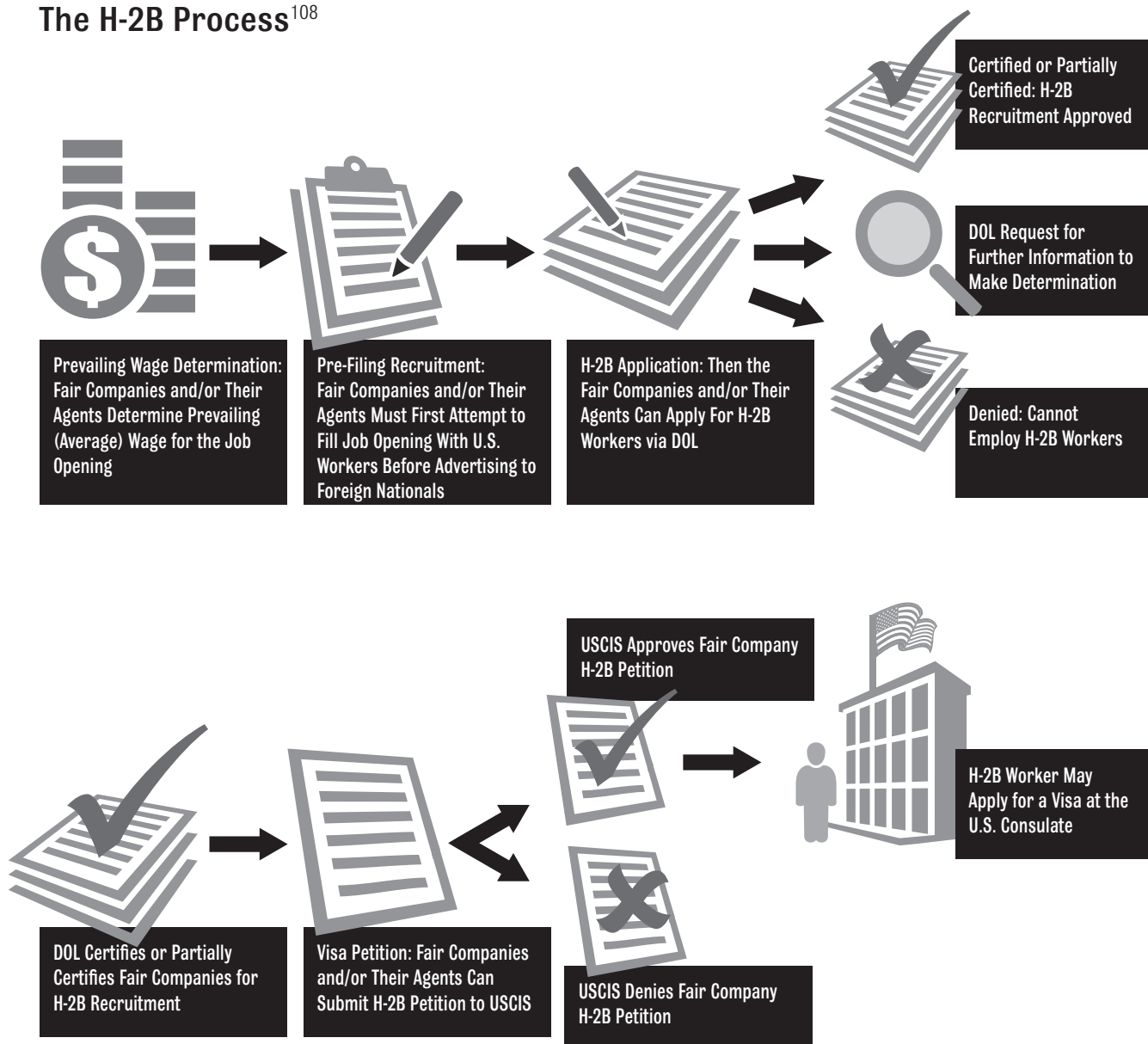
Worker story: Pablo¹⁰⁷

H-2B worker Pablo's one season working with the traveling fairs was miserable. Pablo had been recruited for the job opportunity through a Mexican government agency. Having previously received a good job working for a city government in the southwestern U.S. through this agency, Pablo accepted the traveling fair job. After receiving their first paycheck of about \$140 USD (approximately 1,624 MXN) for two weeks of work at about 11 hours per day and no days off, Pablo and his coworkers unsuccessfully attempted to negotiate higher pay with their employer. When Pablo talked to his wife on the phone, he told her that it was a good thing she could not see him and the way he had to live. After approximately 25 days of work, Pablo and about five other workers left when they realized that the poor work and living conditions were not going to change. Pablo and his coworkers had to threaten to call the police in order to get their passports back from their employer, who had held them since their arrival to the U.S.



Another Mexican sending community. Photo: Rachel Nathanson

The H-2B Process¹⁰⁸



Most internationally recruited workers in the fair and carnival industry, as well as the vast majority of all H-2B visa holders, are Mexican.¹⁰⁹ U.S. employers often contract labor recruiters to identify workers in their home countries, obtain the labor certifications, and file the visa petitions.¹¹⁰ Recruitment from Mexico begins when employers, not workers, initiate the process by requesting permission to bring workers into the U.S. As described in Appendix A, the labor certification and visa application processes, which often coincide with worker recruitment, are complex and involve multiple federal government agencies and actors on both sides

of the border. The labor certification process, which is administered by DOL, entails ascertaining the *prevailing wage* (the average wage paid to workers in the same position as the H-2B worker) for the job in the state where the worker will be working.¹¹¹ The labor certification process also requires that the employer take steps demonstrating that there are no qualified and available U.S. workers for the position offered.¹¹² Once DOL has issued a labor certification, the employer or its agent can then submit a visa petition with DHS' Citizenship and Immigration Services (USCIS).¹¹³ Finally, after USCIS has approved the H-2B petition, the worker



A worker displays his H-2 visa. Photo: Gracia Cuzzi

may apply for a visa at a U.S. consular post abroad.¹¹⁴ If the consular officer approves the worker's visa, the consulate will typically issue the visa and return the passport with the visa affixed to it within a few days.¹¹⁵ Workers generally travel directly from the city where the interview takes place to the U.S. worksite.

The recruitment and application process is employer- and labor agent-driven, involving little input from the workers themselves, and often is the beginning of an imbalanced power dynamic that creates a situation ripe for abuse.¹¹⁶ Recruitment of H-2B fair workers in Mexico usually follows this basic sequence: the recruiter identifies interested workers months in advance; the recruiter obtains personal information

and sometimes personal documents from the workers; the workers are informed that they have been selected to continue with the process and must attend a visa interview; and the workers must often travel to the U.S. to work shortly after receiving the news that they have been selected. Often, workers bear substantial pre-employment costs associated with this recruitment process.¹¹⁷ Additionally, the authors have received anecdotal information from workers who have paid up to 10,280 MXN (approximately \$800 USD) in fees to individuals claiming to be recruiters, only to discover that the opportunity was a scam and that there were no jobs available.¹¹⁸

Recruiters usually identify interested workers through social and family networks and word-of-mouth from previous workers.¹¹⁹ Less frequently, workers are recruited through a formal application. In past years, some workers have applied for H-2B positions through a government-run workforce agency, the *Servicio Nacional de Empleo* (National Employment Service, or SNE), in a particular Mexican state or municipality.¹²⁰ Workers may anticipate being hired when they express interest in the job and provide personal information to a recruiter, but sometimes find out much later that they have not been selected by the employer to move forward in the process or that the recruiter fraudulently offered a job he or she could not provide.¹²¹ The recruiter notifies selected workers of their consular interview appointments and the workers then travel, typically for at least 12 hours, to the U.S. Consulate in Monterrey in the Mexican state of Nuevo Leon (or to another U.S. consulate if the appointment so requires) for the interview.¹²² The visa interview, conducted by a consular official, usually takes place within one week of the job start date.¹²³

“The recruitment and application process is employer- and labor agent-driven, involving little input from the workers themselves, and often is the beginning of an imbalanced power dynamic that creates a situation ripe for abuse.”

“Although prohibited under current H-2B regulations, the workers are often asked to pay recruitment fees to recruiters.”

H-2B workers in the fair and carnival industry incur substantial pre-employment costs that often go unreimbursed by their future employers.¹²⁴ Workers regularly pay most or all of the following costs: passport fees; visa fees; travel costs from their home to the interview location; food and lodging while waiting to be interviewed; border crossing fees; and sometimes, food and transportation costs incurred during the journey to the U.S. worksite.¹²⁵ In addition, although prohibited under current H-2B regulations, the workers are often asked to pay recruitment fees to recruiters.¹²⁶ Workers recruited via the SNE alleged that they were also required to pay for drug testing and criminal background checks.¹²⁷ These out-of-pocket expenses are a significant burden for prospective workers, forcing many to borrow money to cover them and leading many to tolerate substandard working conditions when faced with them in the U.S.¹²⁸

In some cases, workers give recruiters the deeds to their homes or other property as collateral for the recruitment fees and in lieu of a cash payment.¹²⁹ Furthermore, prospective workers assume substantial risk that the pre-employment costs they must incur simply to be considered for a position or to travel to a consular interview may not result in a job if a visa is not available or if the recruiter decides not to hire the worker.¹³⁰ DOL and the courts have found that travel and visa-related expenses are “for the primary benefit of the employer,” and that therefore, employers should reimburse their employees for these expenses should the total amount reduce their first workweek’s wages to below minimum wage.¹³¹ However, despite this DOL guidance, these expenses are rarely reimbursed.¹³²

Prospective Fair and Carnival Workers Pay High Pre-Employment Costs

H-2B workers interviewed for this report reported paying anywhere from the cost of their passport¹³³ to the cost of their passport, visa fees, and travel, including transportation and lodging, plus a recruitment fee. These expenses usually total at least \$100 USD (approximately 1,285 MXN) and sometimes, as much as \$762 USD (approximately 9,792 MXN) or more.¹³⁴ In a petition to the Mexican National Administrative Office under the North American Agreement on Labor Cooperation (NAALC), workers in the traveling fair and carnival industry reported paying between \$330 USD (approximately 4,241 MXN) and \$950 USD (approximately 12,208 MXN) in pre-employment costs in 2007 and 2008.¹³⁵ In a Georgia case, another group of Mexican workers reported paying a \$100 USD (approximately 1,285 MXN) recruitment fee, a \$100 USD visa fee, and \$173 USD (approximately 2,224 MXN) in transportation, food, and lodging costs, as well as substantial passport and background check fees in 2007.¹³⁶



Despite the long hours H-2B workers spend at work operating, assembling, and disassembling midway rides, most report being paid a weekly flat rate of approximately \$300 USD (approximately 3,855 MXN).

Photo: Carson Osberg

Concentrated Power in the Hands of Few Recruiters

The majority of fair and carnival employers contract with the same small group of interconnected labor contracting agents to complete the labor certification and visa applications.¹³⁷ In fiscal year 2011, DOL issued approximately 5,100 certifications for “amusement park worker” positions.¹³⁸ Over 60 percent of those certifications were filed by one labor contracting agent, James Kendrick Judkins of JKJ Workforce Agency, Inc.¹³⁹ The second largest agent, Florida attorney Joe Angel Nichols, filed approximately 22 percent of the amusement park worker certifications that year.¹⁴⁰

In 2008, Nichols signed, as corporate counsel for JKJ Workforce Agency, public comments to DHS on proposed changes to H-2B regulations.¹⁴¹ The fourth largest H-2B recruiting agent in fiscal year 2011 was Alex Trevino of Harlingen, Texas, who filed applications for 100 amusement park workers.¹⁴² Combined, Nichols, Judkins, and Trevino obtained certifications for approximately 86 percent of the H-2B fair and carnival workers authorized by DOL in fiscal year 2011.¹⁴³ Additionally, Trevino and Judkins are listed as agents for two Texas corporations registered on the same day with the same Rio Hondo, Texas address.¹⁴⁴ The third largest agent is Maryland attorney Robert Wayne Pierce, who, along with Judkins, is a member

of OABA.¹⁴⁵ This small number of labor recruitment agents for fair and carnival employers may result in their substantial control over hiring decisions.¹⁴⁶

The fair and carnival companies' labor contracting agents, in turn, frequently hire local recruiters in Mexico,¹⁴⁷ or travel there themselves to hire workers for U.S. clients. Most worker recruitment for fair and carnival employers is carried out by a small number of recruiters. These same recruiters also typically shepherd workers through the visa interview process in Mexico. Recruiters identify workers through formal and informal channels, some exclusively through word of mouth and personal recommendations.¹⁴⁸ Often, a family member who has successfully completed a season in the U.S. will recommend a relative to the local recruiter.¹⁴⁹ In communities where workers have traveled to work in the fairs for decades, some younger workers describe "inheriting" jobs from their older relatives who are no longer able to do the physically demanding work.¹⁵⁰ In past years, the SNE has also played a role in connecting workers with H-2B fair and carnival employers in certain states and municipalities. While recruitment through the SNE may be somewhat more regulated, workers have reported that the information provided to them via the agency in the past has included inaccurate representations of the actual working conditions, pay, and hours.¹⁵¹

In an interview with the authors, Maria described her experience with a recruiter in Veracruz who promised her work in the fairs for the entire duration of her visa.¹⁵² She paid the recruiter 5,000 MXN (approximately \$389 USD) to make her journey to the U.S. Only when she was already in the U.S. did she find out that she would not be paid for days that she was not given work. She spent her first 20 days in the U.S. without work or any source of income. Therefore, Maria was essentially left with no means of recourse and without the ability to seek work elsewhere due to the fact that her visa tied her to that employer, and burdened by the knowledge that she had to earn enough to repay her pre-employment debt.

Because most H-2B fair workers are hired by the same small group of agents and their recruiters in Mexico, individual recruiters on the ground in Mexico wield nearly unchecked power to determine who gets work and who does not.¹⁵³ Workers justifiably fear that protesting or complaining about working conditions will lead them to be targeted for retaliation and loss of employment opportunities in future seasons.¹⁵⁴ Because word of mouth is so important to recruitment, workers often fear speaking up in any way that may interfere with their relationship with the recruiter, as it could also impact the ability of their family and friends to obtain H-2B employment.¹⁵⁵

III Wage and Hour Abuses

“When there wasn’t work, we weren’t able to eat and had to go hungry.”

— *H-2B Worker Juan*¹⁵⁶

Some of the most significant problems for H-2B workers in the fair industry are issues related to payment of wages and the number of hours worked. These problems stem from conditions specific to H-2B workers such as temporary legal immigration status, constant interstate travel, ineligibility for LSC-funded legal assistance, employment tied to a single employer, the nature of the jobs in which workers are typically engaged, and also a lack of adequate DOL monitoring and enforcement efforts. Both the DOL Office of the Inspector General (OIG) and the U.S. Government Accountability Office (GAO) have documented the prevalence of wage and hour abuses throughout the H-2B program and have cited the need for systemic reforms of the program.¹⁵⁷

The Fair Labor Standards Act (FLSA), administered and enforced by the DOL Wage and Hour Division (WHD), protects workers by establishing minimum wage, overtime pay, recordkeeping, and child labor standards.¹⁵⁸ The current federal minimum wage for covered, nonexempt employees is \$7.25 USD (approximately 93 MXN) per hour,¹⁵⁹ and the overtime rate is one-and-a-half times the regular pay rate beyond 40 hours in a workweek.¹⁶⁰ FLSA provides remedies for minimum wage and overtime violations in the form of back pay, liquidated damages, and civil monetary penalties.¹⁶¹ The statute of limitations for filing a

complaint to recover wages begins at the point of an employer’s failure to pay the proper wages.¹⁶² FLSA covers workers regardless of immigration status.¹⁶³ However, some employers and types of industries are exempt from FLSA safeguards. For example, employees of certain amusement establishments are exempt from FLSA minimum wage and overtime pay requirements.¹⁶⁴ Many amusement companies attempt to avoid federally-mandated minimum wage and overtime requirements by claiming that they qualify for the FLSA “seasonal amusement” exemption.¹⁶⁵

To fall under the FLSA “seasonal amusement” exemption, an amusement company must show that it either operates for no more than seven months in any calendar year, or that its average receipts for a six-month period did not exceed 33.3 percent of its average receipts for the other six months of the year.¹⁶⁶ Therefore, some fair companies claiming this exemption may not actually qualify either because they operate for longer than seven months, or because they do not pass the “average receipts” test. For example, José Luis Carmona reported that he worked for Dreamland Amusements, a traveling carnival, for a period of eight months in 2007.¹⁶⁷ Unless Dreamland met the ‘average receipts’ test, he would have been entitled to the then federal minimum pay rate of over \$5.00 USD (approximately 64 MXN) an hour,¹⁶⁸ instead

“H-2B workers report that it is common industry practice to pay employees in cash without providing pay stubs or similar documentation.”

of the \$3.25 USD (approximately 42 MXN) per hour that he received.¹⁶⁹ DOL provides the following example of an application of the ‘average receipts’ test:

An amusement or recreational establishment operated for nine months in the preceding calendar year. The establishment was closed during December, January and February. The total receipts for May, June, July, August, September and October (the six months in which the receipts were largest) totaled \$260,000, a monthly average of \$43,333; the total receipts for the other six months totaled \$75,000, a monthly average of \$12,500. Because the average receipts of the latter six months were not more than 33 and one-third percent of the average receipts for the other six months of the year, the Section 13(a)(3) exemption would apply.¹⁷⁰

Fair companies have the burden of proving that they are exempt under FLSA.¹⁷¹ However, proving the exemption may be hard for many fair companies due to poor maintenance of employment records.¹⁷² Additionally, H-2B workers report that it is common industry practice to pay employees in cash without providing pay stubs or similar documentation.¹⁷³ For employers of non-exempt employees, failure to maintain payroll records is a violation of federal law, and also prevents employees from being able to verify their hours worked and the corresponding wages they are owed.¹⁷⁴

In addition to federal minimum wage laws, many states also have their own minimum wage laws.¹⁷⁵ When an employee is subject to a state minimum wage law that is higher than federal law, that employee is entitled to the higher rate because federal law only sets the floor.¹⁷⁶ In fact, even an employee exempt from FLSA’s federal minimum wage and overtime provisions may be covered by state minimum wage laws that do not provide a parallel exemption for seasonal amusement employers. For example, Montana’s minimum wage law does not provide a parallel FLSA amusement exemption,¹⁷⁷ meaning that employers have to pay workers there the current federal minimum wage of \$7.25 USD (approximately 93 MXN), which the state has also adopted as its minimum wage.¹⁷⁸ In Maryland, a state in which many of the workers interviewed for this report had worked, employers must pay all workers at least the federal minimum wage, but exempts amusement park workers from the overtime rate.¹⁷⁹

Underpaid & Overworked

“I had to work at least 11 hours per day, but on the days that we assembled or disassembled the rides, we worked until 2 a.m. and barely slept. I worked 98 hours a week, and earned \$2 USD (approximately 26 MXN) per hour. I could take a brief break during the day, but only to go to the bathroom or eat. I was tired almost all the time.”

— *H-2B Worker Juan*¹⁸⁰

“We couldn’t even support ourselves, let alone send money home, which is why we came.”

— *H-2B Worker Pablo*¹⁸¹

Almost all workers interviewed for this report had complaints about their wages or hours and often, both. Approximately one-third of the workers interviewed had been provided an estimated number of weekly work hours prior to arriving in the U.S.¹⁸² Of these workers, most had been told they would be working 40 to 50 hours per week.¹⁸³ In reality, however, many traveling fair workers work double that number, including those interviewed for this report.¹⁸⁴ In fact, only one worker stated that he had worked approximately 50 hours per week.¹⁸⁵ At the extreme, typically when fairs move locales, the workers put in 17 to 27 hours in a row.¹⁸⁶ On average, H-2B fair workers interviewed for this report worked approximately 14 hours a day, seven days a week, frequently with no days off.¹⁸⁷ On days when the workers worked through the night, often their only opportunity to rest or sleep was during travel to the next fair.¹⁸⁸

Despite the long hours, fair and carnival H-2B workers are paid an average of \$300 USD (approximately 3,855 MXN) per week.¹⁸⁹ At 50 hours per week, which is the number of hours most of the H-2B workers interviewed for this report had been told they would be working, their hourly pay amounts to \$6 USD (approximately 77 MXN), which is below the federal minimum hourly wage of \$7.25 USD (approximately 93 MXN). A week’s pay, of course, amounts to less per hour the more hours a worker is made to work. However, if a fair company claims the FLSA “seasonal amusement” exemption, DOL’s labor certification application does not require that an employer indicate how it qualifies for the minimum wage exemption.¹⁹⁰ This is a weakness in the employer attestation-based certification process and shows potential for a lack of employer accountability from the outset.¹⁹¹ Moreover, many employers also fail to pay H-2B workers the prevailing wage, or average wage, of workers in the fair industry. Per DOL’s Bureau of Labor Statistics, the national mean hourly wage for amusement and recreation attendants was \$9.60 USD (approximately 124 MXN) as of May 2011.¹⁹²

“ On average, H-2B fair workers interviewed for this report worked approximately 14 hours a day, seven days a week, frequently with no days off. ”



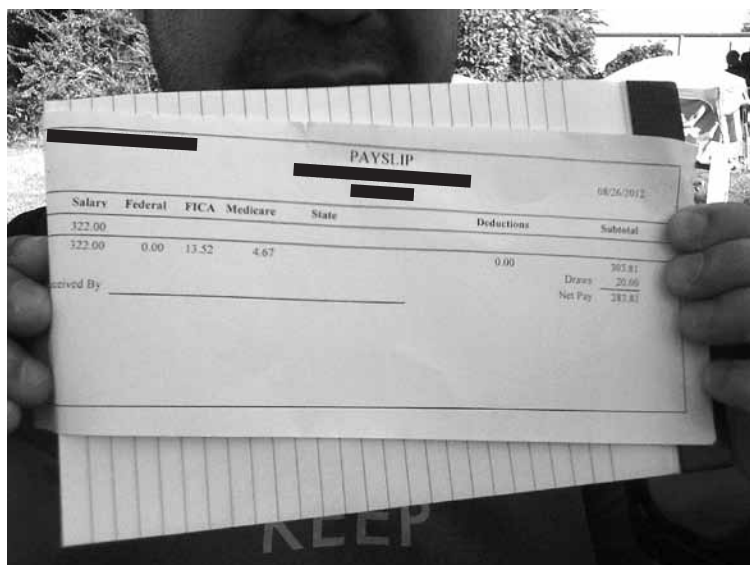
H-2B traveling fair and carnival workers typically work in concessions or as ride operators. Photo: Carson Osberg

Another problem that some H-2B fair and carnival workers face is “benching,” which is when employers do not actually have work for the H-2B workers they have brought to the U.S. and do not pay them for the hours lost.¹⁹³ Two workers interviewed for this report discussed periods when their employer had no work for them and did not pay them for approximately two months. As a result, the workers had no money for food or other necessities.¹⁹⁴ The 2012 H-2B Regulations address this issue with the “three-fourths guarantee” rule, which requires employers to pay workers at least three-quarters of the hours promised in their labor contracts.¹⁹⁵

Traveling fair companies frequently cross state lines and laws change accordingly. Therefore, a company that does not take into account varying state minimum wage laws and instead continues paying the same

lump sum at the end of the week, regardless of where they are operating, may be in violation of state laws. No matter what state they worked in, as stated previously, most of the H-2B workers interviewed for this report earned approximately \$300 USD (approximately 3,855 MXN) a week.¹⁹⁶ For example, Jaime asserted that he and his co-workers are paid the same regardless of the state they are in, which he said affected them because the cost of living is higher in some states, such as New York, New Jersey, or Pennsylvania, than in others, such as Maryland.¹⁹⁷

José de Lira, a Dreamland Amusements employee, recounts his company’s pay practice: “I was paid in cash enclosed in an envelope with the amount of money handwritten on it. I was never provided with any pay stubs, tax forms, or any documentation or receipts in connection with my Dreamland wages.”¹⁹⁸ H-2B worker Jordan, interviewed for this report, was paid \$275 USD (approximately 3,534 MXN) in cash weekly, usually on the Monday of each week.¹⁹⁹ He had to sign a piece of paper stating that he had received the money, but he was never given a pay stub. From his earnings, Jordan often had to pay for part of the required employee uniform, such as an extra t-shirt at \$20 USD (approximately 257 MXN) each or warmer gear if he needed it, such as a rain jacket for \$80 USD (approximately 1,028 MXN), a long-sleeved jersey for \$60 USD (approximately 771 MXN), or a baseball cap for \$15 USD (approximately 193 MXN). These amounts were deducted from his pay but never documented by any type of pay stub.²⁰⁰ These alleged deductions violate DOL regulations because uniforms are considered “for the primary benefit of the employer”²⁰¹ and therefore, should not be deducted from an employee’s wages. H-2B worker Fabricio reported that his employer deducted \$50 USD (approximately 642 MXN) from weekly wages for “insurance,” which is a type of withholding not uncommon with H-2B employers to ensure that the worker completes the work season with them. At least Fabricio’s withholding was returned to him at the end of the season.²⁰² Another employer deducted \$25 USD weekly from an H-2B worker’s pay for “social security,” but never provided the H-2B worker an earnings statement or verification of the deduction.²⁰³



Although Jaime was paid in cash, he was among the few fair workers interviewed who received an earnings statement with his weekly pay. Many workers are simply given cash and have no record of how much they are, or in some cases, are not being paid for their hard work and long workdays.²⁰⁴ Photo: Anne Schaufele

Limited Access to Justice

Worker Story: José Luis Carmona

José Luis Carmona was recruited to work for Dreamland Amusements through SNE in the state of Veracruz. José Luis recounts SNE representatives telling him that “the job would pay \$400 USD [approximately 5,140 MXN] per week for 48 hours of work, plus overtime, and that the costs of [his] transportation from Veracruz to the U.S. would be paid by [his] employer.”²⁰⁵ However, once José Luis arrived in the U.S., he earned a flat weekly salary of \$300 USD (approximately 3,855 MXN), worked an average of 80 hours a week, and never received minimum wage or overtime pay.²⁰⁶ José Luis had little choice but to continue the fair season with Dreamland, despite the company’s failure to honor its initial offer.

José Luis recounts that workers were typically unable to leave the worksite unaccompanied during rest periods. “As a practical matter, the other Mexican workers and I were not permitted to leave the site during our hours of rest... [t]he Dreamland managers usually took us to a Walmart store, and would allow us to shop for a maximum of two hours.”²⁰⁷ This two-hour, employer-organized trip to Walmart was typically the only opportunity for José Luis and his coworkers to leave the fairgrounds.

José Luis’ case is not unique. Recruiters in Mexico are known to promise prospective H-2B workers higher wages than the companies that employ them actually pay.²⁰⁸ Once the workers arrive in the U.S., fair and carnival employers frequently cheat them out of salaries promised not only at the time of recruitment, but also fail to pay the wage required by wage and hour laws. H-2B workers have little leverage with exploitative employers because the terms of their visas only allow them to work for that specific employer. Fearful of employer retaliation,²⁰⁹ most H-2B workers suffer poor work conditions and wage theft silently. The difficult economic conditions in Mexico and the financial and personal costs of obtaining a visa and traveling to the U.S. tend to make most H-2B workers who, like José Luis, find themselves overworked and underpaid, feel they have little choice but to accept exploitative work conditions.

Barriers to justice extend beyond visa-related employment restrictions and fear of retaliation. Often, migrant workers are unfamiliar with the laws of the country or state in which they are working, such that they do not know that employers are in violation of labor and employment laws. Additionally, even when H-2B workers do recognize their rights, they often do not have access to legal representation and therefore, the justice system, to be able to enforce those rights. Constant interstate travel contributes to workers’ isolation and limited access to non-work-related transportation, making it difficult for H-2B workers to find local organizations that can help them with their claims.²¹⁰ The nature of their work requires that workers in the fair and carnival industry travel to different states and often, to small towns or suburbs where public transportation is limited or nonexistent. Without a means of transportation or time to acclimate to their environment, it is difficult for H-2B workers to leave fair sites in search of legal assistance.²¹¹

“Once the workers arrive in the U.S., fair and carnival employers frequently cheat them out of salaries promised not only at the time of recruitment, but also fail to pay the wage required by wage and hour laws.”

Apart from the difficulties associated with the transient nature of the work, another major barrier to justice is the dearth of low-cost legal services for H-2B workers. The Legal Services Corporation (LSC) is the largest source of funding for civil legal aid to indigent persons.²¹² However, LSC-funded organizations are statutorily prohibited from assisting most H-2B workers, including fair and carnival workers.²¹³ LSC prohibits its funds from being used to represent non-U.S. citizens, with the limited exception of representing lawful permanent residents, H-2A agricultural workers, H-2B forestry workers, and victims of domestic violence, extreme cruelty, sexual assault, or trafficking.²¹⁴

Additionally, many legal services programs that do not receive restricted LSC funds operate on a state level and are unable to provide services to workers who may have only worked in that state for a brief time. Private plaintiffs' lawyers similarly find it challenging to represent migrant workers because of the complexities of transnational representation, a lack of interpreters who speak the workers' languages, and the high cost of litigation. Private attorneys rarely represent low-wage workers in private actions due to small recovery amounts.²¹⁵ With significantly limited access to legal services in the U.S., often the only recourse these workers have is to attempt to recuperate unpaid wages once they have returned to their home countries, which has proven difficult.²¹⁶

Even if H-2B workers in the traveling fair and carnival industry are successful in obtaining legal representation, they often work in rural locations and sometimes lack cellular phones, which limits their ability to seek legal assistance or to maintain communication with an attorney. Once their certified employment period ends, H-2B workers must leave the U.S., which poses additional barriers to accessing justice. Upon return to their home countries, communication is even more difficult, and workers are often confronted with the additional challenge of physical presence requirements during litigation against their former employers. Such requirements necessitate obtaining a visa to return to the U.S. to participate in legal proceedings, which can be difficult or impossible to obtain, not to mention costly.

Finally, as discussed in the following section, *Inadequate Enforcement and Oversight*, the current H-2B regulations make it very difficult for H-2B workers in the fair industry to bring legal claims against their employers.²¹⁷ As such, H-2B workers face legal, financial, and practical barriers to justice.

Inadequate Enforcement and Oversight

Laws regulating H-2B workers' wages fail to protect workers' rights to fair wages. The law requires that hiring foreign national workers not adversely affect the wages and working conditions of U.S. workers who are similarly employed.²¹⁸ Therefore, fair and carnival companies must pay H-2B workers a wage similar to that paid to American workers.²¹⁹ However, the prevailing wage regulations involve complex calculations that make it difficult for government agencies to enforce and have been the subject of much debate and litigation.²²⁰ Additionally, some fair operators may not even obtain DOL labor certifications for each state where their H-2B workers work in a given season.²²¹ This could allow an employer to commit wage violations while escaping detection since the DOL labor certification is approved based on comparing the offered wage with the prevailing wage in a given state or geographic region.²²² If a certification fails to list a state and the corresponding prevailing wage in that state, then the offered wage would not be in compliance with H-2B regulations. Furthermore, filing private lawsuits to enforce wage and hour violations in the fair industry is challenging because fair employers claim an exemption from federal and state requirements to keep records of workers' hours and payments.²²³

Unfortunately, reforms necessary to address these issues have been slow, in part due to strong resistance from industry insiders. For many years, the H-2B program was regulated only minimally through DOL administrative opinion letters.²²⁴ In 2008, DOL and DHS implemented major changes to the H-2B program that had the effect of significantly reducing worker

protections.²²⁵ Specifically, the new regulations that went into effect in 2009 (2009 H-2B Regulations)²²⁶ reduced oversight of the H-2B program and reverted to employer self-attestation in the temporary labor certification process.²²⁷ Bureaucratic hurdles have delayed the new methodology that should be used to determine the prevailing wage for H-2B workers.²²⁸ A new wage rule that would have raised the required wages in many industries was issued in 2011, but is currently unfunded due to an appropriations rider that bars DOL from extending funds to implement it.²²⁹ The 2012 H-2B Regulations that are currently stalled by employer-initiated litigation would enhance DOL's ability to enforce the H-2B program requirements by allowing for employer debarment from the program based on failure to pay required wages or to provide adequate working conditions.²³⁰

The H-2B program also suffers from a lack of monitoring. Both the DOL Employment and Training Division (ETA) and the DOL Wage and Hour Division (WHD) play a role in overseeing and administering the H-2B program. WHD, created by the Fair Labor Standards Act (FLSA) to enforce employment laws, also enforces the attestations made by H-2B employers in their temporary labor certification applications.²³¹ WHD's enforcement actions may take the form of a comprehensive investigation, a simple remediation of a single violation,²³² or referral for litigation to DOL's Office of the Solicitor. Unfortunately, WHD appears to investigate very few cases involving H-2B workers.²³³ Between 2007 and 2011, WHD only investigated complaints involving 22 H-2B workers.²³⁴

“The U.S. government has concluded that WHD's wage enforcement is “ineffective...leaving thousands of low wage workers vulnerable to wage theft.”

The U.S. government has concluded that WHD's wage enforcement is "ineffective...leaving thousands of low wage workers vulnerable to wage theft."²³⁵ Despite a growing workforce,²³⁶ between fiscal years 1997 and 2007, the number of WHD enforcement actions decreased by more than a third.²³⁷ Also during that time, almost three-quarters of these enforcement actions were initiated as a result of worker complaints.²³⁸ The remaining enforcement actions were DOL-initiated, typically targeting low-wage industries.²³⁹ GAO found that even when WHD does investigate complaints, the investigations are often delayed for months or years, which causes workers to miss important deadlines, preventing them from recovering the money they are owed.²⁴⁰ Between 1975 and 2004, the number of WHD investigators decreased approximately 14%.²⁴¹ In 2009, Secretary of Labor Hilda Solis announced the WHD's increase in wage and hour investigators and an information campaign to raise worker awareness of their rights.²⁴²

The DOL Employment and Training Division (ETA) adjudicates employer applications for temporary labor certification, which are required for employers to petition DHS for H-2B visas.²⁴³ The temporary labor certification process is currently an attestation-based process, meaning that employers must only attest that they have met the requirements for bringing in H-2B labor and that they will abide by the terms of the H-2B program, rather than prove compliance in order to be certified.²⁴⁴ Specifically, employers are required to attest that there are no qualified and available U.S. workers for the position, that they have a temporary need for labor, and that hiring foreign national workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.²⁴⁵ Employers must also attest that they will pay at least the prevailing wage for the occupation, that they will abide by all federal, state, and local employment laws, and that neither the employer nor its agents have received any type of recruitment or other fee related to attainment of the labor certification.²⁴⁶ As long as

the labor certification application appears to be error-free and in compliance with certification criteria, DOL will generally approve the application based on the employer's word.²⁴⁷

The DOL Office of the Inspector General found, after auditing ETA's H-2B application process, that the employer attestation-based model "does not permit meaningful validation before the [H-2B certification] application is approved."²⁴⁸ DOL has documented many instances in which employers attest to compliance with H-2B program rules, though they are actually not in compliance.²⁴⁹ In one audit, DOL found that over 50 percent of H-2B employers were not in compliance with their obligations under the H-2B program.²⁵⁰ In another audit, DOL found that 27 of 33 H-2B employers could not support the attestations made in their H-2B labor certification applications.²⁵¹ DOL found instances of improper payment to H-2B workers in almost two-thirds of the employers audited, and also instances of employers requiring employees to work outside of the approved work area.²⁵²

As authorized by DOL's 2009 H-2B Regulations,²⁵³ ETA began conducting post-adjudication audits in October 2009 to "verify the accuracy of the applications and ensure integrity within the H-2B program."²⁵⁴ Though the initiation of DOL audits to validate H-2B employers self-attestations is an improvement, the post-adjudication audit method still presents challenges in enforcing H-2B employer compliance with H-2B regulations. These audits usually occur at least six months after the end of the approved period of employment, meaning that any opportunity to take corrective action while the worker is still on-site is lost.²⁵⁵ Additionally, audits are infrequent, and at the sole discretion of the DOL Office of Foreign Labor Certification (OFLC).²⁵⁶ Deferring assessment of employer compliance with H-2B program obligations until after ETA has adjudicated the application for labor certification does not adequately protect workers.

IV Workplace Health and Safety Violations and Abuses

Worker Story: Tomas²⁵⁷

H-2B worker Tomas reported that he sometimes worked from 11 a.m. to 9 a.m. the following day, a 22-hour shift, when they were constructing or deconstructing the rides. He and the other workers sometimes had to assemble or disassemble the rides in the rain, and there was often no time for rest during the days the fair was en route to a new location. Tomas had worked in the U.S. construction industry for the past five years, and he reported that he would rather go back to a construction or factory job the next year to avoid the unsafe and inequitable working conditions at the fair.

Worker Story: Juan José²⁵⁸

H-2B worker Juan José reports that during his 16- to 18-hour days, he and his coworkers were not provided rest breaks or meal periods. They also had to sneak in quick fifteen-minute breaks to eat. Juan José, who lived in a trailer with 10 others, described the trailer as very dirty with cockroach and mold infestations. There were mattresses to sleep on, but no blankets. While he was working, Juan José fell and hurt his hip, but was unable to seek medical assistance. The injury still bothers him at times. Juan José left after one week of work because of the poor pay and dangerous working conditions, and because he could not sleep well in the cramped trailer.

Officially termed *amusement and recreation attendants* by DOL,²⁵⁹ fair and carnival workers' job descriptions include operating, driving, or explaining the use of mechanical riding devices or other automatic equipment in amusement parks or carnivals, and selling and serving refreshments.²⁶⁰ Once the fair is open, usually around noon, these workers operate the rides until closing time, usually around midnight. These arduous shifts are even longer on days when the fair is scheduled to move locations.²⁶¹ Ride operators report that they are required to quickly set up the rides and break them down before the fair or carnival moves on to a new location, which involves heavy lifting and dangerous assembling duties including working at great heights and for long hours.²⁶² The days before

and after a fair moves to a new location are especially long, and often, workers are only allowed "rest" during the travel between fair sites.²⁶³

The amusement industry is fraught with working conditions that pose serious—sometimes fatal—threats to health and safety.²⁶⁴ H-2B workers in the traveling fair industry report frequent illness due to long work hours, sometimes in the rain and cold, unsanitary living conditions, and insufficient rest time.²⁶⁵ The Department of State has recognized the significant health and safety concerns associated with the "nomadic lifestyle" of the traveling fair and carnival industry, leading to the 2012 elimination of traveling fair and itinerant concessions employment placements for J-1 Summer

“The amusement industry is fraught with working conditions that pose serious—sometimes fatal—threats to health and safety.”



Despite the documented instances of worker and fairgoer injury on amusement rides, H-2B workers are rarely given any formal instruction on how to operate rides safely. Photo: Carson Osberg

Work and Travel program participants.²⁶⁶ OSHA, which administers the Occupational Safety and Health Act of 1970 requiring employers to comply with safety and health standards, warn of potential hazards, and provide appropriate safety equipment,²⁶⁷ has documented 92 worker fatalities or catastrophes related to amusement rides since 1984.²⁶⁸ H-2B fair workers' long work hours, physically demanding work with large machinery and equipment, and lack of protective gear or formal training contribute to the already dangerous working conditions.

H-2B workers work for long, arduous hours operating rides, often without a day off. Without time off and access to transportation, workers have difficulty obtaining medical and legal assistance. Photo: CDM, Inc.



Many H-2B workers must assemble and disassemble rides in the darkness. They frequently lack safety equipment such as harnesses and must climb to the top of rides like the Ferris wheel to disassemble them. Photo: Xavier E. Albán

Inadequate Training and Safety Equipment Yield Frequent Injury

A primary activity of many fair and carnival workers is assembling and disassembling midway amusement rides. The work involves loading and unloading heavy equipment and climbing towering rides such as Ferris wheels.²⁶⁹ Employers frequently require that workers perform these jobs without formal training or proper equipment, and sometimes even in the rain and at night.²⁷⁰ Given the incredibly long work hours, the lack of training and proper safety equipment makes amusement workers even more vulnerable to accidents that could otherwise be avoided. Susceptibility to injury tends to be heightened among H-2B workers, who often lack clear communication with their employers due to language barriers²⁷¹ and reluctance to be seen as unsatisfactory workers.²⁷²

H-2B workers interviewed for this report recounted not having proper foot and hand protection when engaged in heavy lifting,²⁷³ and not having helmets, harnesses, or other fall protection when working from great heights.²⁷⁴ Nicolas, profiled in the *Introduction*, was responsible for setting up and tearing down a roller coaster every time it arrived at and left a fair site.²⁷⁵ Setting up and tearing down the ride required him to climb up the side of the ride, over 130 feet high, without any type of harness or net after working 12-hour shifts without breaks, Monday through Sunday.²⁷⁶ Nicolas was never given any protective gear or formal training on how to safely set up or operate the ride.²⁷⁷

“Employers’ failure to provide safety equipment and training puts workers at risk for injuries ranging from small cuts and abrasions to permanent brain injury or death.”

Employers’ failure to provide safety equipment and training puts workers at risk for injuries ranging from small cuts and abrasions to permanent brain injury or death. Approximately a quarter of the H-2B workers surveyed for this report had suffered an on-the-job accident or injury while working for a traveling fair company, and several of them had witnessed coworkers’ accidents.²⁷⁸ H-2B worker Juan José, whose employer failed to provide him with protective equipment and also made the workers move the rides at night, sustained a fall while working. As a result of this fall, Juan José injured his hip, which still bothers him occasionally.²⁷⁹ An investigation of Dreamland Amusements by the New York Attorney General revealed lacerations and inflammation of joints among workers forced to perform their jobs in inclement weather without rainproof clothing.²⁸⁰ In 2011, a carnival worker in North Carolina died from injuries he sustained after falling from a Ferris wheel.²⁸¹

The prevalence of carnival injuries and death, both among workers and fairgoers, makes this lack of training and proper safety equipment especially disconcerting.²⁸² Industry analysts suspect that these stories documenting horrific accidents have prompted OSHA to exact a heightened examination of the safety practices of amusement businesses.²⁸³ In 2007, after a worker had fallen from the top of a carnival ride, OSHA cited the employer and carnival operator, Reithoffer Shows, and proposed a fine of \$62,000 USD for “serious violations” of safety regulations.²⁸⁴ The violations, found during two separate inspections, included Reithoffer’s failure to provide adequate fall protection.²⁸⁵ In 2011,

the same employer was again under OSHA investigation after a ride operator was struck in the face by a ride while operating it, leaving him in critical condition in a coma that lasted three weeks.²⁸⁶

These incidents illustrate a pattern of employers failing to comply with basic safety rules to protect fair and carnival workers’ safety. Not surprisingly, the work conditions of ride operators have also captured the attention of consumer rights advocates, who are concerned with potential harm to the general public visiting the fairs.²⁸⁷ Investigations by the Consumer Product Safety Commission, the federal agency that oversees the safety of mobile amusement rides, have shown that some of the most common causes of ride-related injuries for carnival customers include improper ride assembly and maintenance.²⁸⁸ According to industry statistics, most amusement park accidents are attributed to rider and operator errors, the latter frequently arising out of long working hours, inadequate training, and lack of proper equipment.²⁸⁹

H-2B Worker Health & Lack of Access to Medical Care in the Traveling Fair Industry

“Almost everyone got sick because of the conditions...this sounds bad, but it was worse to live through. It is hard for me to even think about the experience because it brings me sadness to remember how difficult it was.”

— H-2B Worker Pablo²⁹⁰

Worker Story: Jordan²⁹¹

Jordan, an H-2B fair worker from South Africa, asked his employer for medical attention when he was very sick. The employer refused to call or take him to a doctor, even though Jordan had a very high fever and was bed-ridden for several days. His employer told him they were going to dock his pay for the days he was sick. Finally, Jordan's mother in South Africa called the recruiter to complain, and the employer's response was to send a golf cart to his trailer, offering to drop him off at the end of the driveway so that Jordan could walk to a doctor. However, Jordan felt too sick to move and could not walk. Eventually, another employee gave him antibiotics, which helped him recover.

“Fair workers routinely work 80 to 100 hours per week.”

Though less publicized than accidents within the amusement industry, severe illness and death amongst fair workers is not uncommon due to long, strenuous workdays, little rest, unsanitary living conditions, and a lack of access to prompt medical care. H-2B worker Pablo commented that “almost everyone got sick because of the conditions,”²⁹² and at least one H-2B worker stated during his interview that he was currently sick from having to work for many hours outside in the rain.²⁹³ Worker fatigue, while potentially avoidable, can lead to “operator error” accidents and

likely plays a role in illness amongst fair workers. Fair workers routinely work 80 to 100 hours per week.²⁹⁴ Workdays are even longer on days before and after the fair has changed locations. Carnival rides are dismantled at the completion of the last day of a fair at a given location, which typically requires ride operators to work through the night disassembling rides *in addition to* their regular 12- to 14-hour workdays. Once they reach the next destination, workers often assemble rides to prepare the fair for business on the day of arrival or the following day.²⁹⁵

“Time off is sporadic and unpredictable, and workers are often penalized when they take time off for illness, including hospital stays.”

The transient nature of fairs exacerbates H-2B workers' reliance on employers. Unfamiliar with their constantly changing surroundings, H-2B workers rely on their employers for even their most basic needs such as transportation to grocery stores and laundry facilities.²⁹⁶ Several H-2B workers interviewed for this report stated that despite suffering illness or injury while living on or near the fairgrounds and having no access to transportation, their employers still did not help them receive timely medical attention, if any at all. For example, in 2006, H-2B worker Domingo fell and sustained an injury to his tailbone, but kept working after his supervisor instructed him to do so and refused to take him to the doctor. Domingo reports that the injury still bothers him and that past workers now advise future H-2B workers to bring pain medication with them from Mexico since they will likely have to continue working in the event of an illness or injury.²⁹⁷ A Dreamland Amusements worker reported that when he went to his employer to request treatment for a four-week-long flu, his employer refused to take him to a doctor, denied him a rest period to recuperate, and only provided him with over-the-counter pain relievers.²⁹⁸

Even when H-2B workers manage to locate medical assistance, they still face barriers to actually receiving medical attention. Time off is sporadic and unpredictable, and workers are often penalized when they take time off for illness, including hospital stays.²⁹⁹ Adding to these challenges is the fact that fairs are frequently located in rural areas or small towns in which public transportation, if it exists at all, is scarce.³⁰⁰ H-2B worker Jordan reports that his employer might take a worker to receive medical care, but not if the worker

only appears to have a cold or flu.³⁰¹ Additionally, some employers dock their employees' wages for any sick time taken, even though they are not paid hourly.³⁰²

Even when medical care is provided to H-2B workers in the fair industry, it is often not timely enough to prevent unnecessary harm or death. In a publicized New York case, workers were living and working in such appalling conditions for such long hours that an H-2B worker had to be treated in an emergency room for infected bug bites and dehydration.³⁰³ When interviewed for this report, H-2B worker Sebastian discussed the death of a coworker who had fallen from a ride but was not provided prompt medical attention, despite vomiting and having informed supervisors of his fall.³⁰⁴

Many H-2B workers never even report injuries and illness to their employers out of fear of retaliation or being blacklisted from subsequent seasons, such as Miguel, who was not invited back after receiving treatment in the U.S. the previous year for an eye injury.³⁰⁵ H-2B worker Guillermo was injured when part of a ride fell and struck him in the collarbone, but he knew not to ask to go to the doctor, since the cost would be deducted from his wages and he could not afford it.³⁰⁶ The failure to provide access to medical care can lead to more serious medical conditions, increased risk of serious infection, and compromised safety from working while injured or ill.

Difficulties in Obtaining Workers' Compensation



Rides involve heights not just for H-2B workers who build them, but also for the riders whose safety depends on those rides being properly built. Workers are frequently expected to build and take down rides quickly, sometimes throughout the night or in the rain, after working all day. Photo: CDM, Inc.

Worker Story: Leonardo³⁰⁷

In 2011, a Mexican migrant worker from Veracruz named Leonardo Espinabarro Telles died when he was entangled in the fan of a generator while setting up a carnival ride in Vermont for Castlerock Shows.³⁰⁸ Only after his death did officials discover that he was not covered by valid workers' compensation insurance.³⁰⁹ Despite Vermont state law requiring employers to purchase workers' compensation coverage for all workers in the state, officials discovered that Leonardo and his coworkers were likely not covered because Castlerock had workers' compensation insurance through a policy from a New York state insurance provider not licensed to operate in Vermont.³¹⁰ In response to Castlerock's failure to comply with Vermont law, the Vermont Department of Labor issued a stop-work order, prompting Castlerock Shows to purchase a second insurance policy.

Workplace injuries can render workers unable to continue their duties due to a lack of prompt medical assistance or necessary follow-up care. For workers in most industries, workers' compensation is a reliable way to ensure that they continue receiving at least a portion of their pay, even when their workplace injuries prevent them from working.³¹¹ Although most workers' compensation statutes cover foreign national workers,³¹² accessing workers' compensation is less than straightforward for H-2B workers in the traveling fair and carnival industry. Procedural difficulties, limited access to legal assistance, variances in workers' compensation by state, and a lack of clear national regulations guaranteeing workers' compensation benefits for H-2B workers pose significant challenges for these workers.³¹³

Beginning with recruitment, a discriminatory and employer-dominated environment sets the foundation for employers avoiding possible workers' compensation liability.³¹⁴ Since the number and size of claims can increase the premium for an employer's workers' compensation insurance plan, employers are incentivized to limit their employees' workers' compensation claims. Of those H-2B workers who are hired and sustain injuries on the job, many are routinely discouraged by their employers from filing workers' compensation claims.³¹⁵ Additionally, H-2B workers in the fair industry are generally isolated from legal services providers and other community advocates and as such, may not have access to legal assistance or even basic information to be able to navigate the workers' compensation system in the U.S.³¹⁶ In this context, the lack of uniformity in state workers' compensation laws presents an even greater barrier to H-2B workers who may consider seeking compensation.³¹⁷ Some states require that non-resident workers be covered by employers' insurance policies, while others do not.³¹⁸ Sometimes, a worker will not even be covered by workers' compensation insurance in every state in which his or her fair operates.³¹⁹ Even when required by law in one state, states are not always able to oversee compliance by out-of-state companies.³²⁰ Some states mandate that the examining physician be located in the state in which the injury occurred.³²¹ Because H-2B workers are often too fearful to report an injury until it becomes almost unbearable, they are,

in many cases, precluded from obtaining compensation after they have traveled on to a new state or when they leave the U.S. for their home countries.³²² Finally, some states even prohibit nonresident, non-U.S. citizen beneficiaries of workers killed on the job from receiving complete death benefits awards.³²³

Procedural challenges also pose significant barriers to injured H-2B workers seeking workers' compensation. Rules regarding appearances for hearings and before state workers' compensation boards are not always clear as to whether a worker can appear via telephone or whether claimants must attend hearings in person to qualify.³²⁴ If the claimants have returned to their countries of origin, it is difficult, and often nearly impossible, for them to present the required testimony in-person. These barriers mean that even a worker who has found medical and legal assistance and filed a workers' compensation claim may still be prevented from pursuing compensation.

With an H-2B visa, workers must return to their home countries at the end of their employment contract since their immigration status is tied to the employment relationship.³²⁵ Upon their return home, H-2B workers' difficulty asserting their rights to workers' compensation is compounded by distance, communication challenges, and a lack of access to the justice system and legal advocates. Workers who must return home are frequently forced to abandon pending insurance claims and will never see remuneration for their lost wages. Additionally, workers may be unable to obtain visitor visas required to return legally to the U.S. for the purpose of attending medical examinations, workers' compensation hearings, and other hearings. Aside from contributing to a general lack of employer accountability, the difficulty obtaining workers' compensation for H-2B workers is particularly troubling given that some workers are forced to use their homes and other property as collateral for loans used to pay for visa, recruitment, and travel fees to come and work in the U.S.³²⁶ Migrant workers' families may be at risk of losing their homes when a worker dies and they are unable to repay the loans.

Unsanitary and Substandard Housing Conditions

“The trailers we live in are tiny and disgusting.”

— H-2B Worker Stan³²⁷

Worker Story: José Luis³²⁸

H-2B worker José Luis Carmona, who participated in litigation against midway operator Dreamland Amusements, describes his living conditions during two separate carnival seasons with the same employer: “The residential trailers for Mexican workers were overcrowded. Each one typically was occupied by twelve people, grouped into two or three compartments within each trailer. The trailers did not have toilets or air conditioning. I would go to the bathroom in outdoor, portable toilets where they were available.... Also, the trailers leaked when it rained. The trailers’ showers were moldy and the bathrooms smelled strongly of mold, dirty clothes, and dirty feet.”

Worker Story: Jordan³²⁹

When Jordan first arrived to the U.S. from South Africa, his residential trailer had an infestation of bed bugs, and he and his roommate suffered painful red welts all over their bodies. The workers spent one night in a hotel, but when a supervisor did not like this costly arrangement, Jordan ended up sleeping in an equipment truck for a few days while the trailer was fumigated.

Unsanitary and substandard living conditions also threaten traveling fair workers’ health and safety.³³⁰ Unlike the H-2A temporary agricultural worker program, which regulates worker housing,³³¹ there are no similar regulations currently governing the housing furnished by employers to H-2B workers. Even when state or local housing laws do exist on the books, in practice they are rendered meaningless to workers who are constantly on the road, traveling from one jurisdiction to the next. Because of their constant mobility and their unfamiliarity with their surroundings, H-2B fair and carnival workers are forced to rely on their employers for housing, no matter how deplorable the living conditions may be. Additionally, states that do have applicable housing standards are unlikely to have the resources to enforce those rules

when housing is relocated frequently. Since traveling fair operators move regularly, sometimes staying in a particular state for a matter of days, housing accommodations constitute a moving target for state-level housing authorities.

Most of the H-2B workers interviewed for this report live in residential mobile trailers, usually situated behind the fairgrounds, while working at the fairs in the U.S.³³² The trailers are frequently substandard—dirty, cramped, infested with insects, containing dilapidated and moldy mattresses, and lacking heating and air conditioning, functioning showers and toilets, and appropriate kitchen facilities.³³³ Multiple H-2B workers interviewed for this report complained about bed bugs, fleas, and roaches in their housing units.³³⁴

“ Because of their constant mobility and their unfamiliarity with their surroundings, H-2B fair and carnival workers are forced to rely on their employers for housing, no matter how deplorable the living conditions may be. ”



H-2B workers usually reside in employer-provided trailers on or near the fairgrounds. The trailers are often cramped, improperly maintained, and infested by roaches and bed bugs. Photo: Carson Osberg



H-2B workers' trailer with wooden slats holding inflatable mattresses. H-2B workers reside in these tight spaces during their employment with the traveling fairs, which can last up to about nine months a year. Photo: Xavier E. Albán



Lacking cooking facilities, H-2B workers buy portable appliances to engage in basic cooking so as to avoid purchasing costly carnival food. Photos: Anne Schaufele



H-2B worker housing accommodations frequently lack plumbing, so dishes and hands must be washed in buckets. Photo: Xavier E. Albán

Some H-2B workers also report living in mobile trailers with no toilets, requiring them to use portable toilets and public bathrooms.³³⁵ When trailers broke down or were unavailable, H-2B workers were forced to sleep on or under rides, in cars, in dirty trucks storing ride equipment, in tents, or, if they are lucky, in hotel rooms.³³⁶ One worker in the Dreamland Amusements case reported that his employer locked him and other workers inside a residential trailer for seven to 12 hours at a time while transporting them between fair

locations.³³⁷ H-2B workers reported being charged anywhere from \$300 USD (approximately 3,855 MXN) per season to \$80 USD (approximately 1,028 MXN) per week for housing, even when it was overcrowded and unsanitary.³³⁸

Discrimination

“The owner would yell at us and swear at us. He never treated us well. He called us ‘[f***ing] Mexicans’ or ‘[f***ing] tortillas.’”

— *H-2B Worker Domingo*³³⁹

“They called us [f***ing] garbage.”

— *H-2B Worker Nicolas*³⁴⁰

One South African worker commented that, among H-2B workers, the Mexican workers had the worst residential conditions.

— *H-2B Worker Stan*³⁴¹

Among the New York Attorney General Office’s findings in its investigation of Dreamland Amusements was evidence of disparate treatment in housing provided for H-2B workers and American workers. American workers were consistently provided with full bathrooms and air conditioning, while the H-2B workers were not.³⁴² Several H-2B workers also believed that the larger residential trailers of U.S. workers were less crowded.³⁴³

Although there are no explicit federal regulations regarding housing for H-2B workers, Title VII of the Civil Rights Act of 1964 protects private sector workers from a hostile work environment and differential treatment and housing, regardless of workers’ citizenship status.³⁴⁴ Section 703(a)(1) of the Act prohibits discriminatory “compensation, terms, conditions, or privileges of employment, because of such individual’s

race, color, religion, sex, or national origin.”³⁴⁵ Most employers are not subject to a Title VII suit unless they have at least 15 employees.³⁴⁶ If that condition is met, a group of H-2B workers could presumably allege that the substandard housing their employer provides has a discriminatory impact on them because of their race, color, or even national origin. H-2B workers could also allege that their employer created a hostile work environment because of the discriminatory epithets the employer used against them, or disparate wages paid them, based on their national origin.



H-2B fair workers interviewed for this report reported sleeping in employer-provided trailers, while U.S. workers generally slept in tents. Photo: Anne Schaufele

However, the complicated nature of H-2B fair and carnival workers' employment makes discrimination claims harder to pursue. Employees who allege discrimination first have to exhaust their administrative remedies by filing a claim with the Equal Employment Opportunity Commission (EEOC) or the relevant state agency, which may investigate further or issue a Notice of Right-to-Sue.³⁴⁷ The worker has a right to request a notice if 180 days have elapsed since the time of the

request, or if the investigation will take longer than 180 days.³⁴⁸ If the worker receives the notice, he or she is generally required to file a lawsuit within 90 days, with few exceptions.³⁴⁹ Given the complex process the workers would need to navigate, coupled with their transience and limited time in the U.S., filing an EEOC suit is not an effective remedy for H-2B fair workers who suffer discrimination.

V Retaliation

“If they think we’re not working hard enough, they tell us they’re going to send us back to Mexico.”

— *H-2B Worker Tomas*³⁵⁰

“We are told that if we don’t work hard enough, or if we complain, we’ll be sent home.”

— *H-2B Worker Stan*³⁵¹

“[N]othing changes really and we are scared of being fired and sent home.”

— *H-2B Worker Felix, when asked if he could express a work or housing-related concern to his boss.*³⁵²

“Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person’s attempt to report or correct perceived violations of the H-2B provisions.”

— *DOL*³⁵³

Worker Story: Fabricio³⁵⁴

Fabricio’s shifts were typically 12.5 hours long with a lunch break in the middle of the day. He was usually allowed an evening break, but one day, it was 9 p.m. and he still had not been granted one. He decided on his own to take a 30-minute break, and when he returned to his ride, his boss yelled at him for not seeking permission. For this misstep, Fabricio’s boss told him he would not be able to return to work next year.

Worker Story: Miguel³⁵⁵

Miguel, who sustained a serious injury while working at a fair, was promised by his employer that he would bring him back to work the following year so that Miguel could return to the U.S. for follow-up medical care. However, Miguel’s local recruiter later told him that the U.S. employer or labor agent had not put him on the list for the subsequent year and therefore, there was nothing he could do to rehire Miguel. Miguel had loyally and dutifully worked for that company for three years, and in the U.S. fair industry for over five years.

“Because worker recruitment for fair and carnival employers is carried out by a small number of recruiters, workers who protest or complain about working conditions can be easily targeted for retaliation and loss of employment opportunities in future seasons.”

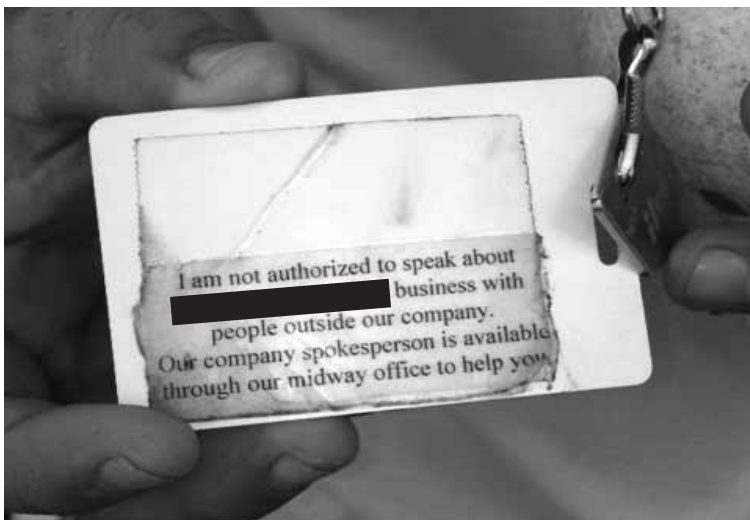
Employer retaliation against workers, and especially the impact of threatened or feared retaliation, is difficult to document but is an important aspect of the vulnerability of H-2B workers. Because H-2B workers' visas bind them to a single employer³⁵⁶ who thus essentially controls their right to remain lawfully present in the U.S., many workers fear that if they fail to perform adequately or complain about work conditions or wages, they will be retaliated against.³⁵⁷ Retaliation is not uncommon and takes the form of fewer hours of work, reduced pay, firing, or deportation. Retaliation may also result in blacklisting,³⁵⁸ which prevents workers from returning to work for an employer or eliminates them from H-2B recruitment altogether in future seasons.³⁵⁹ Because worker recruitment for fair and carnival employers is carried out by a small number of recruiters, workers who protest or complain about working conditions can be easily targeted for retaliation and loss of employment opportunities in future seasons.³⁶⁰

Workers who are fired in retaliation for complaints or who choose to quit because of substandard conditions must immediately return to their home countries.³⁶¹ Employers, playing off workers' immigration status-related vulnerability, often threaten workers with firing and deportation.³⁶² Since H-2B employers are required to report the early termination of an H-2B worker or the workers' abscondment to both DHS and DOL,³⁶³ the deportation threat is even more real for workers, and is a powerful control mechanism for employers. Retaliation affects not only the workers, but also their family members who count on remittances from the family member in the U.S.,³⁶⁴ or who

hope to gain future employment in the U.S. via the same recruiters or employers.

Due to the dire economic situation in Mexico and the financial investment many workers have made to obtain employment in the U.S., many workers tolerate substandard and often deplorable working conditions.³⁶⁵ Additionally, once H-2B workers have undergone the recruitment process and traveled to the U.S. for a job, an expensive process for the workers, they often feel they have little choice but to continue their employment.³⁶⁶ As a result, H-2B workers are reluctant to voice complaints about their pay or their right to adequate resting hours and housing, and also to report injuries and unsafe working conditions, at least not until their employment has ended.³⁶⁷ Retaliation and threats of retaliation have a chilling effect on the ability of workers to assert their rights and redress harm they have suffered in the workplace.³⁶⁸ This reticence to report serves as an additional enforcement barrier given that most WHD investigations into FLSA violations are initiated as a result of worker complaints.³⁶⁹ If H-2B visa holders were permitted to change employers, the threat of employer retaliation would not coerce workers to endure substandard or exploitative work conditions, and would encourage workers to report rights violations.

GAO collected anecdotes of instances of retaliation and suspected retaliation in its 2010 review of 10 closed civil and criminal cases involving H-2B employers.³⁷⁰ For example, GAO found an anecdotal report of an H-2B employee who was sent home after reporting to



An employer instructs H-2B workers not to speak to people outside the company. This creates a barrier to workers voicing their needs because they fear retaliation for “breaking the rules” if caught speaking to an outsider. Photo: CDM, Inc.

police a burglary at the worker housing.³⁷¹ In another incident, GAO had learned of significant wage abuse allegations against a particular H-2B circus operator.³⁷² When GAO personnel asked H-2B workers about their pay, the workers denied that any deductions had been taken from their wages and also refused entry into their own housing without the employer’s permission, which GAO found suspicious.³⁷³

During the course of conducting outreach for this report, the authors noted significant retaliation concerns among H-2B workers. One result of such concerns was workers’ reluctance to discuss their employment conditions with outsiders. The authors were often told that other workers would not want to discuss their employment because they were afraid of losing their jobs.³⁷⁴ Additionally, during informal discussions with workers, the authors learned of employer-called meetings warning H-2B employees not to speak with outsiders about their employment.³⁷⁵ For example, H-2B worker Sebastian was threatened with termination and told he would be blacklisted if he talked to any outside groups about his working conditions.³⁷⁶

Threats of retaliation are also used to push workers to work even harder. For example, H-2B worker Christian reported that his employer got mad at the workers when the company’s sales were not satisfactory and would then threaten them with deportation.³⁷⁷ Additionally, many workers never report injuries and illness to their employers out of fear of retaliation or being blacklisted from hire for subsequent seasons. This concern is very valid when workers like Miguel, who sustained a serious eye injury and received treatment in the U.S., are not invited back to work in subsequent years.³⁷⁸ Similarly, H-2B worker Guillermo was injured when a ride part fell and struck him in the collarbone. He knew not to ask to go to the doctor, since the cost would be deducted from his wage, and he could not afford it.³⁷⁹

Some H-2B workers reported that they would raise concerns with management, but only in a group rather than alone. For example, Domingo conveyed that he would only voice his complaints if other workers agreed to go talk to management together; he would never air grievances on his own because he feared retaliation. Domingo relayed that the owner maintained this fear among his employees by constantly carrying a gun, which he said the owner sometimes fired in the presence of workers. The workers, who also knew the owner kept more guns in his trailer, believed this was a scare tactic.³⁸⁰ Even those who were comfortable voicing complaints often felt that their interests were ignored because they never saw results. As explained by H-2B worker Felix, who has worked with the traveling fairs for three seasons, “[n]othing changes really and we are scared of being fired and sent home.”³⁸¹ Nicolas, a worker from Mexico, states “[e]ven if I had complained, I don’t think she [the employer] would have listened. She thinks that she could buy the world with the money she has. She thinks she can buy people with her money.”³⁸²

As a result of such employment scenarios and the very real fear of retaliation that regularly face H-2B fair and carnival workers like Sebastian, Miguel, and Domingo, dangerous working or health conditions are often revealed and addressed only after tragedy strikes, and workers frequently fail to recover lawfully earned wages.

Conclusion and Recommendations



Necessary protections for H-2B workers will lead to a brighter future. Photo: Xavier E. Albán

As this report documents, H-2B workers in the fair and carnival industry are an extremely vulnerable population in a system that is ripe for fraud and abuse. These workers are frequently subjected to: deceptive recruitment practices and high pre-employment fees and costs; wages that fall far below the minimum wage and overtime pay rates; minimum to no access to legal and medical services; substandard housing; and hazardous

and dangerous workplace conditions. This report calls on federal agencies and state governments to address the urgent national issues arising out of inadequate enforcement of H-2B worker protections. Based upon the issues addressed in this report, the authors make the following policy recommendations:

National Recommendations

Congress Should:

- Enact retaliation protections for workers who report abuse.
- Enact legislation to hold employers strictly liable for all recruitment fees charged to workers.
- Permit H-2B workers to expeditiously request and receive a change of employer. Require DOL to maintain an online database of job openings among H-2B employers in order to facilitate transfers between employers.
- Forbid the charging of recruitment fees by U.S. employers, their agents, or associates and subcontractors of the employer's agents. Investigate the charging of illegal fees. Prohibit U.S. employers, recruiters, and their agents from charging recruitment fees for H-2B visas.
- Require that employers reimburse H-2B workers for all visa and travel costs.
- Extend federally funded legal services to all H-2B workers.
- Remove any exemptions from minimum wage, overtime, and recordkeeping provisions for amusement industry employers from federal labor laws.
- Enact legislation to hold employers, recruiters, and their agents jointly and severally liable.
- Require that all job orders be treated as enforceable contracts. Require employers, recruiters, or their agents to provide each worker with a copy of his or her job order/contract in the worker's native language at the time of recruitment.
- Amend applicable anti-discrimination laws to clearly articulate the available protections for migrant workers, both during the recruitment process and while employed in the U.S.
- Require that H-2B employers demonstrate valid workers' compensation insurance coverage for each state in which the company operates.

The Department of Labor Should:

- Ensure that anti-retaliation provisions are enforced.
- Require through regulations that employers reimburse workers for all visa and travel costs during the first week of work.
- Require that all Temporary Labor Certifications include an hourly rate.
- Forbid the charging of recruitment fees by U.S. employers, their agents or associates, and subcontractors of the employer's agents and investigate the charging of illegal fees.
- Issue a memorandum reminding all fair and carnival employers that they must keep payroll records, pay overtime wages, and pay the highest of the federal minimum wage, prevailing wage, or state minimum wage. The memorandum should remind fair and carnival employers that it is their burden to prove any exemption to these laws.
- Conduct inspections of H-2B fair employers' payroll and average receipts records to ensure compliance with applicable minimum wage and prevailing wage standards.
- Issue rules related to training, breaks, and safety equipment to protect the health and safety of fair and carnival workers.
- Limit the number of hours ride operators may work without a break. Enforce all existing break time regulations.
- Require comprehensive OSHA-designed pre-season occupational health and safety training for all fair workers in their native language.
- Require that fair employers provide paid, pre-season training specific to the rides that workers will be assembling and/or operating.
- Require employers to provide safety equipment such as harnesses and nets at no cost to employees.
- Advertise to every H-2B worker a free, anonymous tip line for health and safety violations at fairs.

Inter-Agency Coordination

The Department of Labor, Department of Homeland Security, Department of State, National Labor Relations Board, and Equal Employment Opportunity Commission should coordinate to:

- Inform employers and H-2B workers about anti-retaliation provisions and consequences of their violation.
- Vigorously investigate and litigate claims of abuse and discrimination against H-2B workers, even after workers have returned to their countries of origin at the expiration of their work visas.
- Defer action or grant other immigration relief to H-2B whistleblowers still in the U.S. so that they can stay in the country to aid in the investigation and prosecution of their employers. Issue short-term visas to workers who have already left the U.S. so that they can return to participate.
- Provide pre-departure and post-arrival orientation upon arrival for temporary workers, including written and oral Know-Your-Rights trainings and contact information for available legal services.
- Create an expedited investigation process for H-2B workers to ensure that all witness testimony and evidence is preserved given the temporary nature of their visas.

State and Local Recommendations

State Governments And Bodies Should:

- Remove any exceptions from state minimum wage and overtime provisions for seasonal fair workers.
- Exempt H-2B fair workers from in-person court appearance requirements for workers' compensation claims, and allow evaluation by out-of-state doctors.
- Eliminate practices precluding noncitizen beneficiaries from collecting on workers' compensation policies when a worker dies on the job.
- Ensure that the state's regulating board or department enforces occupational safety and health standards at fairs through inspections, assessments, and complaint mechanisms.
- Enact and/or enforce state housing regulations for fair workers.
- Vigorously pursue claims or complaints filed by H-2B fair workers for violations of state anti-discrimination laws. Where no state anti-discrimination laws exist, states should take measures to ensure that all workers are protected under state law from all forms of discrimination and retaliation.

Methodology

This report is based on qualitative research conducted through interviews in Maryland, Virginia, and Mexico. Students from the Washington College of Law Immigrant Justice Clinic and staff and volunteers from Centro de los Derechos del Migrante, Inc. visited fairs and carnivals in Maryland and Virginia approximately 16 times (with one preliminary visit to a fair in New York) from August 2011 to October 2012. In addition, CDM staff and volunteers visited workers' home communities in Mexico in June and October 2012.

The authors spoke with many H-2B workers in the traveling fair and carnival industry, collecting 25 formal worker interviews with current and former fair and carnival workers. The workers had been employed by at least 11 different fair and carnival operators, several of which are among the largest H-2B employers in the industry. All of the workers interviewed either had or have H-2B visas to work in the fair and carnival industry. Of the 25 full interviews conducted, 20 workers were Mexican and five were South African. The workers ranged in age from 19 to 53, with an average age of about 32 or 33. In addition, 21 of the H-2B workers interviewed had traveled to the U.S. to work in the traveling fair industry during multiple seasons, anywhere from two to eight times. Before coming to the U.S., the interviewees had worked in a range of industries in Mexico and South Africa, including in the construction, agriculture, and service industries. Most of the workers had learned about the possibility of employment with the traveling fairs through family members, friends, the National Employment Service (*Servicio Nacional de Empleo*) in Mexico, or through a local recruiter. The majority of H-2B workers traveled to the U.S. with people they knew or had met during past years of fair and carnival work.

By speaking with H-2B workers directly, the authors obtained first-hand accounts of the hardships and issues prevalent in the H-2B recruitment process and during the employment period. The interviews focused on the recruitment, job offers, work conditions, and living conditions of H-2B workers in the traveling fair and carnival industry. The authors hoped to learn more about the forces and conditions that give rise to migration; the process of obtaining documentation and traveling to the U.S.; and the experience of living and working at carnivals and fairs throughout the U.S.

In devising the research methodology for this report, the authors emphasized the importance of maintaining the safety and privacy of the research subjects. The authors anticipated that many H-2B workers would be reluctant to participate in interviews for fear of retaliation from their employers or from other individuals involved in the migrant worker recruitment process. For this reason, the authors devised and utilized a bilingual consent form consistent with the human subjects research protocol of American University. The consent form explained the purpose of the interviews, as well as the risks and benefits of participation. If the worker read the consent form him or herself, the interviewer verbally reiterated the risks section. The form also assured interviewees that no personal identifying information, including name and address, would be disclosed to any third party or used in any publication if they wished to remain anonymous. The authors did not provide participation incentives to any of the H-2B workers interviewed, and all the workers who participated did so voluntarily.

Carnival workers were approached at fairs and carnivals and asked if they were workers under the H-2B or J-1 visa programs. If they were, then the authors explained the research and asked the workers for their consent to interview them about their experiences working in the U.S., usually during work breaks. Workers were advised that all identifying information would remain confidential if they wished, that they could stop the survey at any time, and that the interviews could be conducted anonymously. Interviewers presented and reviewed the consent forms, clarified any questions, and obtained a signature on the form before proceeding to conduct a formal interview. After obtaining the workers' informed consent, the authors conducted interviews in Spanish or English, depending on the language the worker was most comfortable speaking. All of the interviewers are fluent or highly proficient in Spanish. Additionally, the authors interviewed some former H-2B workers in their hometowns in Mexico.

Personal accounts revealed in this report remain anonymous when requested by the interviewee. Consequently, when referring to the experiences of individual H-2B workers, the authors frequently use pseudonyms. Likewise, each worker interview has been assigned a number for internal reference; interviews are therefore cited by number and interview date. A few workers have given informed consent to disclose their identities along with their stories. The report also occasionally incorporates some of the first-hand observations of the authors. The primary research for this report is supplemented with research from a range of secondary sources.

Sample Interview in English

Interview Questions for Fair Workers

1. Describe your experience as a fair worker (who contracted you, how much are you paid, how long do you work, what do you do).
2. Describe your housing (how much do you pay, where do you live, and who do you live with).
3. Do you have any complaints about your boss (about work conditions, about your pay, or about any other thing)?

General and Demographic Questions

1. What is your name?
2. Male/Female
3. How old are you?
4. What country are you from?
5. Is this your first time in the United States? If not, how many times before have you come here?
6. What sort of work have you had in the United States?
7. Have you worked in a fair or carnival in the past?
8. What sort of work do you do in your country?

Contracting

1. When and how did you come to the United States?
2. How much did your trip cost and who paid the cost of your trip?
3. Do you have a visa? What type of visa do you have and for how many months?
4. What is the name of the company (or person) that sponsored your visa?
 - A. Name of recruiter?
 - B. Have you worked for more than one company or person during this trip to the U.S., or during previous trips to the U.S.?
5. Do you have a written or oral contract? What does your contract say with respect to your job?
6. Who has possession of your documents (visa, passport, etc.)?
7. Did you arrive by yourself or with other people you know?
8. How did you find out about the job with this company?
9. Who contracted you and what was the arrangement (pay, work days, job description, workplace, work dates, etc.)?

Work Conditions

1. Describe your job (hours, tasks, breaks).
2. Do you have sufficient access to breaks, water, food, bathrooms?
3. How did you learn to do your job?
4. What type of training did you receive before starting work?
5. How are you paid and how much are you paid?

6. If you work more than 40 hours, do you get paid more?
 - A. How does your employer track your hours?
7. Is anything discounted from your pay (taxes, cost of uniforms, housing, food)?
8. Describe the relationship between your boss, supervisors, and with the other fair workers.
9. If you have a complaint about the work or your housing, would you express that concern to your boss? How?
10. Has your boss threatened you with deportation or have you been harassed in any way?
11. Have you had any type of accident at work? What happens when there is an accident?

Housing Conditions

1. Where are you living during this job? Describe in detail the conditions of your housing.
 - A. Do you know if there is other housing for the other workers, and if so, is that housing different?
2. Do you have access to transportation in case you need something?
3. How much do you pay for housing?

Final Questions

1. Are there any problems or complaints with your job that you would like to share with us?
2. Do you know of any other workers who would be willing to speak with us?
3. When is the best time to speak with you or other workers?

Sample Interview in Spanish

Entrevista para trabajadores en las Ferias

1. Describa su experiencia como trabajador de feria (quien lo contrato, cuanto le pagan, cuantas horas trabajas, y que hace).
2. Describa su vivienda (cuanto paga, donde vive, y con quien).
3. ¿Tiene alguna queja en cuanto a su patrón (sobre las condiciones de trabajo, su pago, la vivienda, o cualquier otra cosa)?

Preguntas Generales y Demográficas

1. ¿Cuál es su nombre?
2. Hombre/Mujer
3. ¿Cuántos años tiene?
4. ¿De qué país viene?
5. ¿Es su primera vez en los Estados Unidos? ¿Si no, cuántas veces has llegado?
6. ¿Qué tipo de trabajo ha tenido en los Estados Unidos?
7. ¿Ha trabajado en una feria o carnaval en el pasado?
8. ¿Qué tipo de trabajo tiene en su país?

Contratación

1. ¿Cuándo y cómo llegó a los Estados Unidos?
2. ¿Cuánto costó su viaje y quién pagó el costo de su viaje?
3. ¿Tiene una visa? ¿Cuál tipo de visa tiene y por cuántos meses dura?
4. ¿Cómo se llama la compañía (o la persona) que patrocinó su visa?
 - A. ¿Cómo se llama el reclutador?
 - B. ¿Ha trabajado para más que una compañía o persona durante este viaje a los EE.UU., o durante los viajes anteriores a los EE.UU.?
5. ¿Tiene un contrato escrito u oral? ¿Qué dice su contrato con respecto a su trabajo?
6. ¿Quién está en posesión de sus documentos (visa, pasaporte, etc.)?
7. ¿Llegó solo o con otras personas que conoce?
8. ¿Cómo se enteró del trabajo con esta compañía?
9. ¿Quién le contrató y cuál fue el arreglo (pago, días de trabajo, descripción de trabajo, lugar del trabajo, fechas de trabajo, etc.)?

Condiciones de Trabajo

1. Describa su trabajo (horas, tareas, descansos).
2. ¿Tiene suficiente acceso a descansos, agua, comida, baños?
3. ¿Cómo aprendió hacer su trabajo?
4. ¿Cuál tipo de capacitación recibió antes de empezar el trabajo?
5. ¿Cómo y cuánto le pagan?

6. ¿Si usted trabaja más de 40 horas, le pagan más?
 - A. ¿Cómo registra su patron las horas que trabaja?
7. ¿Le descuentan algo del pago (impuestos, gasto para uniformes, vivienda, comida)?
8. Describa la relación con su patrón, sus jefes, y con los otros trabajadores en la feria.
9. ¿Si usted tiene una queja sobre el trabajo o su vivienda, lo expresaría a su patrón? ¿Cómo?
10. ¿Su patrón le ha amenazado con deportación o ha tenido algún tipo de acoso?
11. ¿Ha tenido algún accidente en el trabajo? ¿Qué pasa cuando hay un accidente?

Condiciones de Vivienda

1. ¿Dónde vive durante este trabajo? Describa en detalle las condiciones de su vivienda.
 - A. ¿Sabe si hay otra vivienda para los demás trabajadores, y si es así, ¿es diferente que esa vivienda?
2. ¿Tiene acceso a transporte en caso de que necesite algo?
3. ¿Cuánto paga por su vivienda?

Preguntas Finales

1. ¿Hay alguna queja o problema con su trabajo que quiere compartir con nosotros?
2. ¿Sabe de otros trabajadores que estarían dispuestos a hablar con nosotros?
3. ¿Cuál es la hora mejor para conversar con usted o con otros trabajadores?

Appendix A:

H-2B Labor Certification³⁸³ and Visa Application Process

To begin the H-2B visa application process, an employer or the employer's agent must first ascertain the prevailing (average) wage for the position offered.³⁸⁴ Because the Immigration and Nationality Act (INA) requires that hiring a foreign national worker will not adversely affect the wages and working conditions of U.S. workers,³⁸⁵ the wages paid to a foreign national worker must at least equal that paid to other workers, regardless of nationality, in a given occupational classification.³⁸⁶ This is the *prevailing wage*, which is not the same as a minimum wage; rather, the prevailing wage is the average wage paid to workers in the same position as the H-2B worker (and thus may be greater than the minimum wage). In the immigration context, the prevailing wage becomes the minimum allowable wage an employer must pay foreign nationals employed in the same positions as their U.S. citizen and permanent resident worker counterparts.³⁸⁷

Next, employers must begin "pre-filing recruitment" of U.S. workers to fill available positions.³⁸⁸ Employers must advertise the position at the prevailing wage rate through designated channels,³⁸⁹ and if qualified U.S. workers respond to the job postings, the employer must consider them, hire those who are qualified and available, and reject only those for whom they have "lawful job-related reasons."³⁹⁰ These requirements for recruiting U.S. workers, however, are not onerous, and employers looking to ensure eligibility for H-2B visas generally meet this burden easily with limited advertising in local geographic areas.³⁹¹

After the "pre-filing recruitment" of workers, the employer or labor-contracting agent may submit an H-2B application to request workers.³⁹² The H-2B

application is comprised of the *Application for Temporary Employment Certification* (ETA Form 9142, also commonly referred to as a "labor certification application"); a recruitment report that includes recruitment efforts, information on any U.S. worker applicants and reasons for not hiring those applicants; and a description of the need for temporary workers.³⁹³ Additionally, the application must describe the job being offered, including the number of hours expected and an hourly work schedule, the rate of pay for regular and overtime hours to be worked, and the geographic area(s) where the work will be performed.³⁹⁴ Prospective H-2B employers must also submit *Application for Temporary Employment Certification, Appendix B.1* (ETA Form 9142, Appendix B.1), by which the employer certifies that it will abide by the H-2B program's conditions of employment.³⁹⁵ The DOL Office of Foreign Labor Certification (OFLC) will review the application and either certify or deny the application, or request additional information.³⁹⁶ If the application appears to be error-free, OFLC will either certify or partially certify the employer.³⁹⁷ A partial certification will either reduce the period of employment or the number of H-2B workers authorized.³⁹⁸ Also called a "labor certification," the *Temporary Employment Certification* is only valid for the number of workers, designated employer and area of employment,³⁹⁹ and the specific occupation and duties described in the application and authorized by OFLC.⁴⁰⁰ Additionally, the employment period and duration must match that requested in the *Application for Temporary Employment Certification*, and may not begin before the certification date.⁴⁰¹

After DOL issues certification to the employer for a certain number of workers at the specified prevailing wage rate, the employer or contracting agent then recruits workers in Mexico (or another eligible foreign country).⁴⁰² The employer or an agent submits a *Petition for a Nonimmigrant Worker* (USCIS Form I-129) to the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), along with a copy of the labor certification determination and the required fee.⁴⁰³ The I-129 requests biographical data of the beneficiary and information on the employment and the employer.⁴⁰⁴ Additionally, the *H Classification Supplement to I-129* requests information on the type of employment need (seasonal, intermittent, etc.), whether the beneficiary has come to the U.S. on an H visa previously and if he or she complied with the terms of his or her status, and whether the beneficiary has paid the employer or agent any form of compensation as a condition of employment (for example, a recruitment fee).⁴⁰⁵ In the USCIS Form I-129 Instructions, USCIS makes clear that a labor contracting agent may file the petition, but that the agent must “guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition.”⁴⁰⁶ In its review of the I-129, USCIS ensures that the foreign national meets the U.S. requirements for admissibility. USCIS generally grants H-2B status for the period authorized by the *Temporary Employment Certification*, and the maximum period of H-2B classification that can be granted is three years.⁴⁰⁷ Once the I-129 is approved, the employer is notified of the approval via USCIS Form I-797.

Lastly, after USCIS approves the H-2B nonimmigrant worker petition, the beneficiary must apply for a visa at a U.S. consulate abroad, if he or she is not already in the U.S.⁴⁰⁸ To apply, applicants must complete the Department of State online nonimmigrant visa application, DS-160, pay the \$190 visa fee,⁴⁰⁹ and then follow the consulate’s instructions to schedule a visa interview.⁴¹⁰ Form DS-160 requests biographical information about each applicant, including the applicant’s prior travel to the U.S.; contact information in the U.S.; family information; work, education and training information; and information about the employer and the place of employment.⁴¹¹ Although an approved I-129 petition constitutes *prima facie* entitlement to H classification,⁴¹² the consular interview ultimately determines if a worker is issued a visa, not an approved *I-129 Petition for a Nonimmigrant Worker*.⁴¹³ Using the information submitted via the DS-160 and gathered from a personal interview, the consular officer will determine the applicant’s eligibility for a nonimmigrant visa.⁴¹⁴ During the interview, the consular officer is required to ensure that the worker has read and understands the contents of an information pamphlet about the rights of and protections for temporary workers. Otherwise, the consular officer must provide the pamphlet and discuss its contents.⁴¹⁵ If the consular officer approves the worker’s visa, the U.S. consulate will typically issue the visa and return the passport with the visa affixed to it within a few days.⁴¹⁶

Appendix B:

Fair Employers' 2012 H-2B Labor Certification States and Their Fair Routes

Amusement Company	State in Which Employer is Certified for H-2B Workers ⁴¹⁷	Fair Route/States Served
Alpine Amusement Company, Inc.	Illinois	Illinois, Indiana, Wisconsin ⁴¹⁸
Bates Brothers Amusement Company	Ohio	New York, Ohio, Pennsylvania ⁴¹⁹
Big O Amusements, Inc.	Ohio	Florida, Ohio ⁴²⁰
Big Rock Amusements LLC	Tennessee	Georgia, Kentucky, Michigan, North Carolina, South Carolina ⁴²¹
Butler Amusements, Inc.	California	Arizona, California, Idaho, Nevada, Oregon, Washington ⁴²²
Casey's Rides, Inc.	Kentucky	Kentucky, Tennessee ⁴²³
City of Fun Carnival, Inc.	Utah	Arizona, Idaho, New Mexico, Utah, Wyoming ⁴²⁴
Cowboy Attractions	Florida	From New York to Florida ⁴²⁵
Deggeller Attractions, Inc.	Florida, Virginia	Arkansas, Maryland, Virginia ⁴²⁶
Elliott's Amusements, LLC	Michigan	Michigan ⁴²⁷
Fantasy Amusement Company, Inc.	Illinois	Illinois ⁴²⁸
Fernandez Events, LLC	Hawaii	Hawaii ⁴²⁹
Floyd and Baxter Company, Inc.	Tennessee	Servicing the Midwestern United States ⁴³⁰
Frank Joseph and Sons, Inc. DBA Jolly Shows	Maryland	Maryland, Virginia ⁴³¹
Gillette Shows, Inc.	Massachusetts	Connecticut, Maine, Massachusetts, New Hampshire, New York, Vermont ⁴³²
Gold Medal Shows	Georgia	Georgia, Tennessee ⁴³³
Guadagno & Sons Amusements	California	California ⁴³⁴
Inners Amusement Company, Inc. DBA Majestic Midway	Pennsylvania	Delaware, Maryland, New Jersey, Pennsylvania ⁴³⁵
J.A. Blash Shows, Inc. DBA Swartwood Amusement Co.	California	California ⁴³⁶
Kissel Entertainment	Alabama	Alabama, Georgia, Indiana, Kentucky, Ohio, Tennessee ⁴³⁷

Amusement Company	State in Which Employer is Certified for H-2B Workers⁴¹⁷	Fair Route/States Served
Midway Rides of Utica	New York	New York, Pennsylvania ⁴³⁸
Mitchell Brother's & Son's, Inc.	Louisiana	Louisiana, Mississippi ⁴³⁹
Murray Brothers Inc.	Ohio	Indiana, Kentucky, Ohio ⁴⁴⁰
Myers International Midways, Inc.	Florida	Alabama, Florida, Kentucky, Tennessee ⁴⁴¹
North American Midway Entertainment (NAME)	Texas, Louisiana, New York	Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, New York, Ohio, South Carolina, Tennessee, Texas, Wisconsin ⁴⁴²
Ottoway Amusement Company, Inc.	Kansas	Kansas, Oklahoma ⁴⁴³
PBJ Happee Day Shows, Inc.	Arkansas	Arkansas, Illinois, Missouri ⁴⁴⁴
Peachtree Rides	Georgia	Georgia ⁴⁴⁵
Playworld Unlimited, Inc.	Michigan	Florida, Hawaii, Michigan, Minnesota, North Carolina, Ohio, South Carolina, Wisconsin ⁴⁴⁶
Ray Cammack Shows, Inc.	Arizona	Arizona, California, Texas ⁴⁴⁷
Reithoffer Shows, Inc.	Florida	As far north as Vermont and as far south as Florida ⁴⁴⁸
Rockwell Amusements & Promotions, Inc.	Rhode Island	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island ⁴⁴⁹
S & S Amusements, Inc.	Pennsylvania	Maryland, New York, Pennsylvania ⁴⁵⁰
Sam's Amusements and Carnivals, Inc.	Oklahoma	Iowa, Kansas, Missouri, Nebraska, Oklahoma, Texas ⁴⁵¹
Smokey's Greater Shows, Inc.	Maine	Maine ⁴⁵²
Strates Shows, Inc.	Florida	Florida, Georgia, New Jersey, New York, North Carolina, Virginia ⁴⁵³
Sun Valley Rides, LLC	Arizona	Arizona, Colorado, New Mexico, Texas, Utah ⁴⁵⁴
Swank's Steel City Shows	Pennsylvania	Pennsylvania, West Virginia ⁴⁵⁵
Swyear Amusements, Inc.	Illinois	Arkansas, Illinois ⁴⁵⁶
TAS, Inc. DBA Todd Armstrong Shows, Inc.	Texas	Southern states and areas of the Midwest ⁴⁵⁷
Thomas Carnival, Inc.	Texas	Arkansas, Iowa, Louisiana, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Texas, Utah ⁴⁵⁸
W. Scott Miller DBA Miller Amusements	New Hampshire	The New England area ⁴⁵⁹
Wade Shows, Inc.	Florida	Delaware, Florida, Michigan, Missouri, Nebraska, North Carolina, Oklahoma, Texas ⁴⁶⁰
Wagner's Carnival, LLC	Texas	Kansas, Nebraska, Oklahoma, Texas ⁴⁶¹
Wood Entertainment Company	Texas	From California to Florida ⁴⁶²

Appendix C:

DOL 2011 H-2B Labor Certifications and Associated Labor Agents*

Labor Agent: James Kendrick Judkins/JKJ Workforce Agency, Inc.

Amusement Company	# of H-2B Workers Certified
Ray Cammack Shows, Inc.	340
Butler Amusements, Inc.	247
Wade Shows, Inc.	216
Reithoffer Shows, Inc.	123
Helm & Sons Amusements, Inc.	89
Brown's Amusement, Inc.	67
Talley Amusements, Inc.	60
Playworld Unlimited, Inc.	60
Thomas Carnival, Inc.	58
Fernandez Events, Inc.	56
Luehrs' Ideal Rides, Inc.	56
Arnold Amusements, Inc.	50
Swyear Amusements, Inc.	49
Smokey's Greater Shows, Inc.	45
Amusements of America	43
WK Events DBA Interstate Amusements of America	40
Gilette Shows, Inc.	40
Ring & Ring DBA Wright's Amusements Co.	40
Kissel Entertainment, Inc.	35
Inland Empire Sows, Inc. DBA Inland Empire-Royal	35
Casey's Rides, Inc.	35
Big O Amusements, Inc.	35
Blue Sky Amusements & Entertainment Ltd	34
Midway Rides of Utica	34

Amusement Company	# of H-2B Workers Certified
Shamrock Amusements, Inc.	30
S&S Amusements, Inc.	30
Crystal Rock Amusements, Inc. DBA Castlerock Shows	30
Paul Maurer Shows, LLC	30
Tas, Inc.	30
Myers International Midway	30
World Amusements, Inc. DBA American Traveling Shows	30
Guadagno and Sons Amusements DBA G&S Shows	30
Family Attractions Amusements, LLC	30
Paradise Amusements, Inc.	30
Coleman Bros. Shows, Inc.	28
Frank Joseph and Sons, Inc. DBA Jolly Shows	28
Moore's Greater Shows, LLC	25
Midway West Amusements, Inc.	25
Paradise Amusements	25
Elliot's Amusements, LLC	25
Brass Ring Amusements, Inc. DBA Midway of Fun	23
McDonaghs's Amusements, Inc.	23
Peachtree Rides	20
Doolan Amusement Company	20
M.G.R. Amusements, Inc.	20
Mitchell Bros. & Sons, Inc.	20
Sun Valley Rides, LLC	20
Robert Cory DBA Heart of American Shows	19
Mark Fanelli's Traveling Amusement Park, Inc.	19
Kastl Amusements	19
City of Fun Carnival, Inc.	19
S.J. Entertainment, Inc.	18
Cedar City Amusements DBA Cumberland Valley Shows	17
Wagner's Carnival, LLC	15
21st Century Shows, Inc.	15
PBJ Happee Day Shows, Inc.	15

Amusement Company	# of H-2B Workers Certified
Tinsley's Amusements, Inc.	14
W. Scott Miller DBA Miller Amusements	14
Big Rock Amusements	12
Dickson Carnival Company	12
Bennett's Amusement, Inc.	11
Wagner's Carnival, LLC	9
Total: 2,717	

Labor Agent: Joe A. Nichols

Amusement Company	# of H-2B Workers Certified
North American Midway Entertainment	729
Mid American Shows Delaware, Inc.	110
Astro Amusement Co., Inc.	100
All Star Amusement Co., Inc	75
E.J. Amusements of N.H. Inc.	60
Strates Shows, Inc.	54
Total: 1,128	

Labor Agent: Robert Wayne Pierce

Amusement Company	# of H-2B Workers Certified
Deggeller Attractions, Inc.	78
Lowery Carnival Company, Inc.	50
A of R Services, Inc.	48
Alpine Amusement Company, Inc.	43
Gold Star Amusements, Inc.	34
Wood Entertainment Company, Inc.	30
Ottaway Amusement Company, Inc.	20
Showtime Rides, Inc.	15
Thomas D Thomas Shows, Inc.	15
Floyd and Baxter Company, Inc.	12
Total: 345	

Labor Agent: Alex Trevino

Amusement Company	# of H-2B Workers Certified
Greg's Crescent City Amusements	25
Midwest Rides and Concessions	20
Mid-American Carnival, LLC	15
Big C's Enterprises, LLC DBA Fun Time Shows	15
Jim's Rides, Inc.	11
Total: 86	

Labor Agent: Vincent Martin Martin

Amusement Company	# of H-2B Workers Certified
Fantasy Amusement Company, Inc.	38
Total: 38	

Labor Agent: Gregory J. Vartanian

Amusement Company	# of H-2B Workers Certified
Little Richards Enterprises, Inc.	30
Total: 30	

Labor Agent: Joel Pfeffer

Amusement Company	# of H-2B Workers Certified
Swank's Steel City Shows	20
Total: 20	

Labor Agent: No Labor Agent Reported

Amusement Company	# of H-2B Workers Certified
Rose Isle Inc.	27
Total: 27	

* This is not intended to be a comprehensive list of all traveling fair and carnival companies.

Appendix D:

Side-By-Side Comparison of 2009 and 2012 H-2B Regulations

This is a reproduction of a chart the Department of Labor had provided to the general public for guidance. The original can be found at WHD H-2B Side-by-Side Comparison of the 2009 and 2012 Rules, Wage and Hour Div., U.S. Dep't of Labor, <http://www.dol.gov/whd/immigration/H2BFinalRule/H2BSideBySide.htm>.

Issue/Provision	2009 Regulations	2012 Regulations
General Information		
Effective Dates	For Applications for Temporary Employment Certification (Application), ETA Form 9142, filed on or after January 18, 2009 until April 23, 2012.	For Applications for Temporary Employment Certification (Application), ETA Form 9142, filed on or after April 23, 2012. Registration will be implemented at a later date to be announced in the Federal Register.
Regulation Location	20 CFR Part 655, subpart A	20 CFR Part 655, subpart A 29 CFR Part 503
Forms Required to Obtain Certification from ETA	Employer submits and receives a prevailing wage determination and then submits an Application, ETA Form 9142, from which ETA determines temporary need and assesses the employer's test of the labor market.	Employer submits and receives a prevailing wage determination and then submits an H-2B Registration (after the transition period), from which ETA certifies temporary need for up to three years. Each season, employer submits an Application, ETA Form 9142, a copy of the job order, and additional documentation from which ETA assesses the employer's job opportunity and then orders recruitment to ensure a thorough test of the labor market. The Application, ETA Form 9142, and required documents must be submitted 75–90 calendar days before the employer's date of need.
Emergency Situations		The Certifying Officer may waive the normal filing timeframe (i.e., 75-90 calendar days before the employer's date of need). So long as there is enough time to test the labor market and provided that the employer can demonstrate a good and substantial cause, the employer may simultaneously file the H-2B Registration (if necessary), application, and job order less than 75 calendar days before its start date of need.
Temporary Need	Except for one-time need, temporary need is limited to 10 months or less.	Except for one-time need, temporary need is limited to 9 months or less.

Issue/Provision	2009 Regulations	2012 Regulations
General Information, Cont'd.		
Job Contractors	Full participation of job contractors permitted. Beginning April 2011, job contractors and their clients, the end-employers, must declare joint employment on the Application, and both must indicate their agreement to comply with the H-2B terms and conditions by signing Appendix B to the Application.	Participation of job contractors is limited to those with their own genuine temporary need for workers on a temporary seasonal or one-time occurrence basis. The job contractor and its clients, the end-employers, must continue to declare joint employment, and both must continue to sign Appendix B agreeing to comply with the H-2B terms and conditions.
Corresponding Employment	No language explicitly defining corresponding workers, although U.S. workers who are hired in response to required H-2B recruitment are granted the same terms and conditions of employment as H-2B workers.	Corresponding workers are generally defined as non-H-2B workers who perform either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, with exclusions for certain long-term incumbent workers and workers with a Collective Bargaining Agreement or individual employment contract. Corresponding workers are entitled to the same rights and benefits as H-2B workers.
Timing of Recruitment	Employer attests that it has completed all required recruiting before submitting the Application; also attests it was unable to locate sufficient number of qualified U.S. workers. Employer must submit a recruitment report with the Application at time of filing. State Workforce Agency (SWA) job posting is active for 10 days, before filing the Application with ETA.	Employer completes required recruitment after filing the Application, and must demonstrate – not merely attest – that it was unable to locate sufficient number of U.S. workers. Employer must submit recruitment report to ETA after filing, according to instructions from the Certifying Officer. State Workforce Agency (SWA) job posting and Department's electronic job registry job posting stay active and employers must continue to accept U.S. applicants until 21 days before the date of need.
Definition of Full-Time	30 hours or more per week	35 hours or more per week
Disclosure of Foreign Recruitment	No requirement, although employer must contractually prohibit recruiters from seeking or receiving fees from prospective workers.	When filing an Application, employer and its agents and attorneys must provide copies of any agreements with recruiters engaged in international recruiting. In addition, employer and its agent and attorney must provide the names and locations of sub-contractors hired by the recruiter who will recruit H-2B workers.
Termination of Job Order		In the event of an unforeseeable, catastrophic man-made event or Act of God, the employer may petition ETA for early termination of job order (employer may not act until Certifying Officer has actually approved the termination of the job order).
Re-Certification		In the event that a U.S. worker does not report for employment or abandons the job before the end of the job order, the employer can request from ETA an expedited re-certification in order to gain approval to hire H-2B workers. The Certifying Officer must first determine that no replacement U.S. workers are available. Additional recruitment of U.S. workers is not required.
Withdrawal		An employer may withdraw its application at any time after acceptance but before adjudication.

Issue/Provision	2009 Regulations	2012 Regulations
Violations		
Misrepresentation of a Material Fact	Includes misrepresentations made on the Application and to the Department of State during the visa application process.	Includes misrepresentations made on the H-2B Registration with ETA; on the Application; on the DHS Petition (Form I-129); and/or to the Department of State during visa process.
Substantial Failure of a Condition of Employment	Includes substantial failures of conditions of the Application and DHS Petition.	Includes substantial failures of conditions of the Application and DHS Petition, and also includes the H-2B Registration.
Conditions of Employment		
Disclosure		Employers must disclose the job order to all H-2B and corresponding workers; must be in a language understood by the workers, as necessary or reasonable.
Offered Wage	Offered wage equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage, and must be paid for the entire employment period certified in the Application.	Offered wage equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage, and must be paid for the entire employment period certified in the Application. Employer must pay at least the offered wage free-and-clear, either in cash or in a negotiable instrument payable at par.
Incentive-Based Wages	If earnings are based on commissions, bonuses or other incentives, employer must guarantee to pay at least the offered wage on a weekly, biweekly, or monthly basis.	If earnings are based on commissions, bonuses, or other incentives, employer must guarantee to pay at least the offered wage every workweek. The 2012 regulations also address piece rates. An employer paying a piece rate wage must guarantee to supplement that wage if, at the end of every workweek, the piece rate does not at least equal what the worker would have earned under the hourly offered wage.
Frequency of Pay		Employer must pay the more frequent of: every two weeks or according to prevailing practice in the area of intended employment.
Deductions	Employer must make all deductions required by law. Other deductions must be disclosed, reasonable, and consistent with the Fair Labor Standards Act (FLSA) for employers subject to the FLSA.	Employer must make all deductions required by law. Other deductions must be disclosed and reasonable according to the Fair Labor Standards Act (FLSA) principles at 29 CFR Part 531. Also explicitly allows worker-authorized voluntary deductions to third parties for the benefit of the worker. Deductions not required by law that are not disclosed in the job order are prohibited.
Employer Provided Items		Employer must provide, without charge or deposit, all tools, supplies, and equipment needed to perform the job.
Three-Fourths Guarantee		Employer must guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays in every 12-week period (or, for job orders less than 120 days, every 6-week period).
Earnings Statements		Employer must keep accurate pay and hours records and supply workers with earnings statement on or before each payday.

Issue/Provision	2009 Regulations	2012 Regulations
Conditions of Employment, Cont'd.		
Job-Opportunity and Full-Time Threshold	Job opportunity is a bona fide, full-time temporary position. Full time defined as 30 or more hours per week.	Job opportunity is a bona fide, full-time temporary position. Full time defined as 35 or more hours per week. Workweek is defined as a regularly recurring period of 168 hours (seven consecutive 24-hour days).
No Strike or Lockout	H-2B job may not be vacant because former occupants are on strike or locked out.	There may not be any strike or lockout in any of the employer's worksites within the area of intended employment.
Required Recruiting Activities	<p>Employers must conduct required recruiting. No discrimination in hiring; rejections are only for lawful, job-related reasons; employer must maintain and submit a recruitment report, indicating the source, name, and disposition of each worker, along with the lawful reasons for any rejections.</p> <p>Required recruiting includes: SWA job posting for a 10-day period before the employer files the Application; newspaper ad on 2 days during the 10-day SWA posting; the call-back of, and offer of re-employment to, U.S. workers laid off within 120 before date of need; union referrals where the employer is party to a CBA covering the occupation.</p>	<p>Same.</p> <p>Required recruiting includes: SWA job posting until 21 days before the date of need; newspaper ad on 2 days (one a Sunday); the call-back of, and offer of re-employment to, former U.S. workers (including workers who were laid off) from the previous year; contacting the bargaining representative or (if there is no bargaining representative) posting the job for 15 business days at 2 conspicuous locations at every place of employment; other recruiting activities directed by Certifying Officer.</p> <p>The SWA performs two additional activities: contacts the union, where the occupation or industry is customarily unionized; sends the job order to DOL for posting on the national job registry.</p>
No Layoffs	Employer has not and will not lay off any U.S. worker in the occupation and the area of intended employment during the period 120 days before and after the first date of need.	Employer has not and will not lay off any U.S. worker in the occupation and the area of intended employment during the period from 120 days before the first date of need through the end of the period of employment. Layoffs for lawful, job-related reasons (such as lack of work or the end of a season) are not disqualifying if all H-2Bs are laid off before corresponding U.S. workers.
No Preferential Treatment of H-2B Workers	The offered terms and conditions are not less favorable than those offered to H-2B workers.	The offered terms and conditions are not less favorable than those offered to H-2B workers. Employers may not impose on U.S. workers restrictions or obligations not imposed on H-2Bs.
Prohibited Fees	Employer and its agent and attorney may not seek or receive payment for any costs associated with the certification, including attorney/agent fees, Application costs, and recruitment fees.	Employer and its agent, attorney, and employees may not seek or receive payment (including, but not limited to, monetary payments, wage concessions, kickbacks, bribes, etc.) for any costs associated with the certification, including attorney/agent fees, Application costs, DHS Petition fees, and recruitment fees.
Contracts with Recruiters	Employer must contractually prohibit recruiters whom the employer engages in international recruitment of H-2B workers from seeking or receiving fees from prospective workers.	Employer must contractually prohibit agents and recruiters (and any employee of those agents and recruiters) whom the employer engages directly or indirectly in international recruitment of H-2B workers from seeking or receiving fees from prospective workers.

Issue/Provision	2009 Regulations	2012 Regulations
Conditions of Employment, Cont'd.		
Transportation and Subsistence Expenses	Employer is liable under H-2B regulations only for outbound travel and only when the worker is dismissed prior to the end of the certified period of employment. Travel expenses paid by the worker may also be covered under FLSA in the first and last workweeks of employment.	Employer is liable under H-2B regulations for reasonable cost of 1) inbound travel, including daily subsistence expenses, for workers who complete 50% of the job order, and 2) outbound travel, including daily subsistence expenses, for workers who work until the end of the job order or are dismissed early. In addition, if worker is entitled to Federal minimum wage, then the FLSA requires reimbursement of inbound costs in the first workweek. All transportation provided by the employer must comply with applicable Federal, State, and local laws and regulations.
Visa and Visa-Related Expenses	Not an employer obligation under H-2B. May be covered under FLSA in first workweek.	Employer is required to pay or reimburse in the first workweek the full cost of visa and visa-related expenses.
Place of Employment	Employer may not place H-2B workers outside the area(s) of intended employment certified on the Application.	Same.
Certified Occupation	Inaccurate statements on the Application regarding the occupation and job duties may be pursued as willful misrepresentations of the Application.	Employers may not place H-2B workers in a job opportunity not certified on the Application.
Accuracy of Statements	The dates of and reasons for temporary need and the number of positions must be accurately stated on the Form 9142.	Inaccurate statements may be pursued as willful misrepresentations of the Application.
Workers Rights Posters		Employer must post a workers' rights poster in English, provided by WHD, and in other languages as needed and provided by WHD.
No Unfair Treatment		The employer has not and will not (and has not and will not cause another person to) intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any person who, with respect to 8 U.S.C. 1184(c), 20 CFR Part 655, Subpart A, 29 CFR Part 503, or any other Department regulation promulgated thereunder: has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with a workers' center, community organization, labor union, legal assistance program or attorney; or exercised or asserted on behalf of himself/herself any right or protection.

Issue/Provision	2009 Regulations	2012 Regulations
Conditions of Employment, Cont'd.		
DHS/ETA Notification of Early Separation	Employers must notify USCIS and ETA within two workdays of any H-2B worker who separates before the end of the certified period of employment.	Employers must notify USCIS and ETA within two workdays of an H-2B worker who separates before the end of the certified period of employment. Employers must notify ETA within two workdays of any corresponding worker who separates before the end of the period of employment. If separation is due to voluntary abandonment by the worker and proper notification is made, the employer will not be responsible for return transportation and the worker will not be entitled to the three-fourths guarantee beyond the last, full 12- or 6-week period before abandonment. If separation is due to dismissal for cause and proper notification is made, the employer will not be liable for the three-fourths guarantee beyond the last, full 12- or 6-week period before termination.
Compliance with Other Employment-Related Laws	During the period of employment, employers must comply with all other employment-related laws, including employment-related health and safety laws.	During the period of employment, employers must comply with all other employment-related laws, including employment-related health and safety laws. Employers and its agents are prohibited from confiscating or holding immigration documents.
Cooperation with Investigators	Employers must at all times cooperate in administrative and enforcement proceedings. An employer being investigated must make available to WHD the records, information, person, and places that WHD deems appropriate. Records must be made available within 72 hours following notice from WHD. No employer or representative or agent of the employer may interfere with any Department official performing an investigation, inspection, or law enforcement function pursuant to the H-2B program.	The employer will cooperate with any agent of the Secretary of Labor who is exercising or attempting to exercise the Department's authority pursuant to the H-2B program. The employer will retain all documents pertaining to the Application and Registration, the recruitment-related documents, the payroll records, and related documents for 3 years, and make them available to WHD within 72 hours after a request from WHD.

Issue/Provision	2009 Regulations	2012 Regulations
Remedies		
Revocation		ETA may revoke a labor certification for a variety of reasons, including fraud; willful misrepresentation of a material fact; substantial failure of a term or condition of employment; failure to cooperate with DOL or law enforcement; or failure to comply with DOL remedies, sanctions, or decisions.
Civil Money Penalties (CMPs)	Up to \$10,000 per violation. CMPs are equal to back wages and subject to a \$10,000 total cap for violations related to H-2B wages, prohibited fees, and improper deductions. Highest penalties are reserved for violations that involve harm to U.S. workers.	Up to \$10,000 per violation. What constitutes a single violation: "Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition constitutes a separate violation." CMPs are equal to back wages subject to the \$10,000 cap for violations related to H-2B wages, prohibited fees, and improper deductions. CMPs are equal to wage assessments for U.S. workers who were improperly laid off or not hired or rehired. Highest penalties are reserved for violations that involve harm to U.S. workers.
Debarment	WHD does not have independent debarment authority. WHD may recommend debarment to ETA after a final determination. ETA must debar within 2 years of the occurrence of the violation. ETA debarment authority also extends to agents and attorneys. Debarment period: between 1 and 3 years.	WHD does have independent debarment authority to debar employers, agents, and attorneys. Debarment extends to all other labor certifications (other visa programs) with DOL. Offenses that may be cause for debarment are broader than in 2009 regulations. Debarment period: between 1 and 5 years.
Other Remedies	Include back wages, reinstatement of U.S. workers, and any other appropriate legal or equitable remedy (such as make-whole wages for U.S. workers improperly laid off or not hired/rehired).	Include back wages, enforcement of provisions of the job order, make-whole relief for any person discriminated against, and make-whole relief, including instatement/reinstatement for U.S. workers improperly laid off or not hired/rehired, or other actions deemed appropriate.

Endnotes

¹ The H-2B program allows U.S. employers to bring workers into the U.S. for temporary, seasonal, non-agricultural work. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2012).

² *See* Marnie Eisenstadt, *State Fair Vendor Abused Workers from Mexico*, POST STANDARD (Apr. 19, 2011), http://www.syracuse.com/news/index.ssf/2011/04/vendor_abused_mexican_workers.html (recounting the story of Samuel Rosales Rios and others working for Peter's Fine Greek Foods, a Greek food stand at the New York State Fair).

³ *See* Compl. at ¶ 15, *Vazquez v. Karageorgis*, No. 10-cv-04839 (E.D.N.Y. Oct. 21, 2010).

⁴ *See id.* at ¶ 3; *see also* Eisenstadt, *supra* note 2.

⁵ *See* Compl. at ¶¶ 31, 40, *Vazquez*, No. 10-cv-04839; *see also* Eisenstadt, *supra* note 2.

⁶ The rate varied depending on the year of employment, from 2008 to 2010.

⁷ *See* Compl. at ¶¶ 18-34, *Vazquez*, No. 10-cv-04839; *see also* Eisenstadt, *supra* note 2.

⁸ *See* Eisenstadt, *supra* note 2.

⁹ *See* First Am. Compl. at ¶ 54, *Vazquez v. Karageorgis*, No. 10-cv-04839 (E.D.N.Y. Jan. 24, 2011); *see also id.*

¹⁰ *See* *Vazquez v. Karageorgis*, No. 10-cv-04839 (E.D.N.Y. May 23, 2012) (settlement agreement); *see also* John O'Brien, *NY State Fair Vendor Is Accused of Human Trafficking for Underpaying Migrants*, POST STANDARD (Nov. 18, 2010), http://www.syracuse.com/news/index.ssf/2010/11/ny_state_fair_vendor_is_accuse.html (describing federal criminal charges, which were eventually dropped, and a civil suit facing the owner of Peter's Fine Greek Foods).

Peter's Fine Greek Foods' owner, Pantelis Karageorgis, settled with the H-2B workers and the Worker Justice Center of New York for \$75,000 USD (approximately 963,750 MXN) as compensation for wage violations and other abuses the workers suffered from 2008 to 2010. *See* Marnie Eisenstadt, *State Fair Vendor Has Settled Civil Suit that Accused Him of Keeping Workers in Slave-like Conditions*, POST STANDARD (Dec. 19, 2012), http://www.syracuse.com/news/index.ssf/2012/12/state_fair_vendor_has_settled.html.

¹¹ *See* Interview 1 (June 24, 2012); Interview 2 (June 24, 2012); Interview 3 (Aug. 24, 2012); Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 6 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 8 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 10 (Aug. 24, 2012); Interview 11 (Aug. 24, 2012); Interview 12 (Aug. 29, 2012); Interview 13 (Aug. 31, 2012); Interview 15 (Sept. 9, 2012); Interview 16 (June/July 2012); Interview 17 (Sept. 16, 2012); Interview 18 (Sept. 16, 2012); Interview 19 (Sept. 18, 2012); Interview 21 (Sept. 22, 2012); Interview 22 (Oct. 20, 2012); Interview 23 (Oct. 20, 2012); Interview 24 (Oct. 20, 2012); Interview 25a (June/July 2012); Interview 25b (Oct. 25, 2012).

¹² *Wages: Minimum Wage*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited Jan. 15, 2013).

¹³ *See Wages: Overtime Pay*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/wages/overtimepay.htm> (last visited Jan. 13, 2012) (explaining overtime pay is "at least one and one-half times regular rates of pay"). At the minimum wage of \$7.25 USD (approximately 93 MXN) per hour, the overtime rate would be \$10.88 USD (approximately 140 MXN) per each hour in excess of a 40-hour week.

¹⁴ Employers must pay H-2B workers an amount at least equivalent to the *prevailing* (or average) wage earned by all workers (including U.S. workers) in the occupation in that particular geographic region, which can be determined via O*Net Online. According to O*Net Online, the median wage for an Amusement and Recreation Attendant nationally in 2011 was \$8.97 USD (approximately 115 MXN) per hour, and \$18,650 USD (approximately 239,653 MXN) annually. This would amount to \$358.80 USD (approximately 4,611 MXN) for a 40-hour workweek and \$897 USD (approximately 11,527 MXN) for an 80-hour workweek). In Virginia, the median wage for the same occupation was \$8.63 USD (approximately 111 MXN) per hour while in Maryland, it was \$8.99 USD (approximately 116 MXN) per hour. *See Summary Report for: 39-3091.00 – Amusement and Recreation Attendants*, O*NET ONLINE, <http://www.one-tonline.org/link/summary/39-3091.00> (last visited Jan. 15, 2013) (under "State & National" select a state to view its median wage for Amusement and Recreation Attendants).

¹⁵ Based on the federal minimum wage, workers should earn \$7.25 USD (approximately 93 MXN) per hour in a 40-hour workweek, with overtime earnings of \$10.88 USD (approximately 140 MXN) per hour for each hour worked beyond 40 in a given week. Assuming an 80-hour workweek, workers are being underpaid by approximately \$425 USD (approximately 9,316 MXN) weekly, unless the employer is exempt from paying the federal minimum wage. At \$300 USD weekly (approximately 3,855 MXN), workers are presumably being paid at an hourly rate of \$7.50 USD (approximately 96 MXN) for a 40-hour workweek, and are therefore being underpaid by approximately \$450 USD (approximately \$5,783 MXN), based on the same federal minimum wage calculation. Either way, H-2B workers should generally be earning over \$800 USD (approximately 10,280 MXN) more per pay period (bi-monthly) than they are, unless an employer qualifies for an exception to the federal minimum wage and overtime laws. Since H-2B workers are not being paid overtime and are working very long hours, they are often effectively working for \$3 to \$4 USD (approximately 39 to 51 MXN) per hour.

¹⁶ Federally-funded legal services organizations are generally only able to provide legal assistance to U.S. citizens and lawful permanent residents, with some exceptions. 45 C.F.R. §§ 1626.1, 1626.4-1626.5 (2012). Refugees, foreign national victims of trafficking, and domestic violence survivors may be assisted with LSC funds, but most H-2B workers are ineligible. Although Public Law 110-161 authorized LSC-funded legal services programs to represent temporary forestry workers with H-2B visas, most other H-2B holders are not considered “eligible aliens” under 45 C.F.R. §§ 1626.2-1626.5, meaning that they are unable to receive LSC-funded legal assistance. In fact, 45 C.F.R. § 1626.9 requires a representative who is representing an eligible alien to discontinue representation if changed circumstances renders the alien ineligible. In contrast, however, H-2A workers are allowed to receive legal assistance on provisions of their employment contract if the matter is related to wages, housing, transportation, and “[o]ther employment rights as provided in the worker’s specific contract.” 45 C.F.R. § 1626.11 (2012).

¹⁷ The Legal Services Corporation is the largest funder of civil legal aid to indigent persons in the U.S. *See Fact Sheet on the Legal Services Corporation*, LEGAL SERVICES CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Jan. 15, 2013).

¹⁸ The H-2B program allows U.S. employers to bring workers into the U.S. for temporary, seasonal, non-agricultural work. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2012).

¹⁹ Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker).

²⁰ USD is the currency abbreviation for the U.S. dollar. MXN is the currency abbreviation for the Mexican peso.

²¹ At 12 or 13 hours a day, 7 days a week, Nicolas worked approximately 87.5 hours a week. At \$275 USD (approximately 3,534 MXN) weekly, Nicolas was effectively earning approximately \$3.14 USD (approximately 40 MXN) per hour.

²² *See* S. POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE U.S. 2-5 (2007), http://cdna.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf. The “Bracero” program from 1942 to 1964 was the result of an agreement between Mexico and the U.S. to bring farm workers from Mexico to work in the U.S. Though the program theoretically included significant legal protections and regulations, in practice, the workers experienced serious abuses, harassment, and slavery-like conditions. Employers took advantage of workers, many of whom were unfamiliar with the English language and forms of legal recourse, much like what H-2 workers experience today.

²³ *See H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGRATION SERV., <http://www.uscis.gov/portal/site/uscis/menuitemc89243c6a7543f6d1a/?vgnextoid=d1d333e559274210VgnVCM100000082ca60aRCRD&vgnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD> (last updated July 20, 2012).

²⁴ LABOR, IMMIGRATION & EMP. BENEFITS DIV. OF THE U.S. CHAMBER OF COMMERCE & IMMIGRATIONWORKS USA, THE ECONOMIC IMPACT OF H-2B WORKERS 11 (2010), http://www.uschamber.com/sites/default/files/reports/16102_LABR%20H2BReport_LR.pdf [hereinafter *ECONOMIC IMPACT*]; *OFLC Case Disclosure Data*, EMP’T AND TRAINING ADMIN., DEP’T OF LABOR, *available at* <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm> (last visited Jan. 26, 2013).

²⁵ H-2B employers have generally resisted efforts to strengthen the H-2B program, including the implementation of greater protections for workers, which they view as contrary to their business interests. *See* Compl. at ¶ 2, *Louisiana Forestry Ass’n, Inc. v. Solis*, No. 11-7687, 2012 WL 3562451 (E.D. Pa. Aug. 20, 2012) (Seven different organizations of H-2B employers jointly filed this complaint in federal district court to challenge DOL’s new “wage rules,” which would increase the amount H-2B employers would be required to pay their H-2B employees); *see also* Mississippi Pep, *Senator Cochran moves to block H-2B foreign worker visa regulations*, MISSISSIPPI PEP (June 15, 2012, 2:19 PM), <http://mississippipep.wordpress.com/2012/06/15/senator-cochran-moves-to-block-h-2b-foreign-worker-visa-regulations/>. In fact, fair and carnival employers have been part of the opposition to DOL’s 2012 H-2B Regulations, which were released in February 2012 but are now stalled by federal litigation. *See* *Temporary Non-Agricultural Employment of H-2B Aliens in the U.S.*, 77 Fed. Reg. 10,038 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503).

²⁶ Compl. at ¶ 14, *Louisiana Forestry Ass’n, Inc. v. Solis*, No. 11-7687, 2012 WL 3562451 (E.D. Pa. Aug. 20, 2012) (“Many of the members are almost completely dependent on the availability of H-2B workers to perform the assembly and

operation of rides, games, and cooking and service of food at these events, and few are able to find U.S. workers who are willing to take and stay in these temporary jobs that require travel from locale to locale.”).

²⁷ See Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. at 10,038.

²⁸ Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

²⁹ Interview 6 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

³⁰ Robert Strauss, *Family-Run Amusement Parks Surviving a Downturn*, N.Y. TIMES (Sept. 23, 2009), http://www.nytimes.com/2009/09/24/business/smallbusiness/24sbiz.html?_r=1&pagewanted=all.

³¹ *A Decade of Challenge and Change: Trends in the Traveling Amusement Company Industry*, TOURIST ATTRACTIONS & PARKS MAG., Jan. 5, 2012, <http://tapmag.com/2012/01/05/a-decade-of-challenge-and-change-trends-in-the-traveling-amusement-company-industry/>.

³² U.S. Citizenship and Immigration Services describes an employer with a *seasonal need* for labor as a need for workers “traditionally tied to a season of the year by an event or pattern.” *H-2B Temporary Non-Agricultural Workers*, *supra* note 23 (emphasis added). However, DOL indicates that Applications for Temporary Employment Certification can be approved for periods of up to 10 months. *H-2B Certification for Temporary Non-Agricultural Work*, EMP’T AND TRAINING ADMIN., U.S. DEP’T OF LABOR, <http://www.foreignlaborcert.doleta.gov/h-2b.cfm> (last updated Dec. 19, 2012).

³³ U.S. DEP’T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION, H-2B PROGRAM DISCLOSURE DATA FOR FY 2011, *available at* <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm> (last visited Jan. 13, 2012).

³⁴ Specifically, the top 10 occupations in fiscal year 2012 are, in descending order: laborer (landscape); forest worker; amusement park worker; cleaner, housekeeping; groundskeeper (industrial commercial); housekeeper; waiter/waitress; landscape gardener; construction worker; and cook. EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEP’T OF LABOR, H-2B TEMPORARY NON-AGRICULTURAL VISA PROGRAM — SELECTED STATISTICS (2012), http://www.foreignlaborcert.doleta.gov/pdf/h_2b_select_statist_oct2011_may_2012.pdf [hereinafter H-2B SELECTED STATISTICS].

³⁵ See Sanctions and Remedies-General, 29 C.F.R. § 503.20 (2012); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1053, H-2B VISA PROGRAM: CLOSED CIVIL & CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD & ABUSE (2010), www.gao.gov/new.items/d101053.pdf.

For an in-depth discussion on lack of DOL enforcement of compliance with H-2B program rules, see *infra* Part III, Wage and Hour Abuses, *Inadequate Enforcement and Oversight*.

³⁶ See Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593 (May 11, 2012) (to be codified 22 C.F.R. pt. 62), <http://j1visa.state.gov/wp-content/uploads/2012/05/2012-swt-ifr.pdf> (“The 14 non-sponsor participants who supported the Summer Work Travel Program included small businesses, an amusement park industry association, and individual citizens.”); *National Legislation*, OUTDOOR AMUSEMENT BUS. ASS’N, <https://www.oaba.org/Gov't-relations/national-legislation/> (last visited Oct. 30, 2012); *Update from the OABA's DC Lobbyist*, OABA SHOWTIME MAG. (Oct. 2012), http://www.branchsmith.com/ebook/oaba/40379_OABA/index.html#6/.

³⁷ *Your Voice in the Mobile Amusement Industry*, OUTDOOR AMUSEMENTS BUS. ASS’N, <https://www.oaba.org/about/> (last visited Jan. 15, 2012).

³⁸ See Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503); *State Legislation*, OUTDOOR AMUSEMENTS BUS. ASS’N, <https://www.oaba.org/Gov't-relations/state-legislation/> (last visited Jan. 15, 2012).

³⁹ *Federal Regulations*, OUTDOOR AMUSEMENTS BUS. ASS’N, <https://www.oaba.org/Gov't-relations/state-legislation/> (last visited Jan. 15, 2012).

⁴⁰ Press Release, New York Attorney General’s Office, Attorney General Cuomo Secures Hundreds of Thousands in Restitution for Carnival Workers Discriminated Against and Cheated Out of Proper Pay (Aug. 31, 2009), *available at* <http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-hundreds-thousands-restitution-carnival-workers>.

⁴¹ See S. POVERTY L. CTR., *supra* note 22, at 2-5.

⁴² Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2012); see *H-2B Temporary Non-Agricultural Workers*, *supra* note 23.

⁴³ Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99 to 603, 100 Stat. 3359 (1986) (the text of IRCA can be accessed at “<http://www.uscis.gov>” www.uscis.gov, under “Public Laws Amending the INA”).

⁴⁴ *Id.* at § 301(a)(b) *revised by* Immigration Act of 1990, Pub. L. No. 101 to 649, § 205 (Nov. 29, 1990); see also ANDORRA BRUNO IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 2 (2006), <http://fpc.state.gov/documents/organization/62664.pdf>. The H-2A temporary visa program permits employers to petition for workers on a temporary and seasonal basis for work classified as agricultural. Unlike the H-2B program, however, the H-2A program guarantees workers employer-provided and regulated housing, higher minimum wages, workers’ compensation insurance coverage, and eligibility for LSC-funded legal services. Immigration and Nationality Act § 1101(a)(15)(H)(ii)(b); see *H-2A Temporary Agricultural Program*, EMP’T AND TRAINING ADMIN., U.S. DEP’T OF LABOR, <http://www.foreignlaborcert.doleta.gov/h-2a.cfm> (last updated Jan. 16, 2013).

⁴⁵ *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

⁴⁶ 8 C.F.R. §§ 214.2(h)(1)(i), (h)(1)(ii)(D) (2013).

⁴⁷ *Cap Count for H-2B Nonimmigrants*, U.S. CITIZENSHIP AND IMMIGRATION SERV., http://www.uscis.gov/h-2b_count (last updated Jan. 22, 2013).

⁴⁸ For example, in fiscal year 2011, the amusement industry (comprised of more than just traveling fair and carnival employers) obtained labor certifications for more than 5,000 H-2B workers. *See OFLC Case Disclosure Data*, EMP'T AND TRAINING ADMIN., DEP'T OF LABOR, *available at* <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm> (last visited Jan. 26, 2013).

⁴⁹ ECONOMIC IMPACT, *supra* note 24; *see also* Richard Ruelas, *Immigrant Carnival Workers Bring Strong Work Ethic, Drug-Free Culture*, AZCENTRAL.COM (Apr. 8, 2011, 2:25 PM), <http://www.azcentral.com/news/azliving/articles/2011/04/08/20110408immigrant-mexican-workers-changing-us-carnivals.html>.

⁵⁰ 8 U.S.C. §§ 1103(a)(6), 1184(c)(14)(B).

⁵¹ *See* Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 76 Fed. Reg. 15,130 (Mar. 18, 2011) (to be codified at 29 C.F.R. pt. 503, 20 C.F.R. pt. 655), http://www.foreignlaborcert.doleta.gov/pdf/2011_6152.pdf (citing several criminal cases involving H-2B employers, including one in which 39 Filipino H-2B workers were forced to work in country clubs and hotels in Florida); *see also* Testimony of Mary C. Ellison Before the Tom Lantos Human Rights Commission, *International Human Trafficking and Forced Labor* 4 (Nov. 28, 2012), http://tlhrc.house.gov/docs/transcripts/2012_11_28_Human%20trafficking/Mary%20C%20Ellison%20Testimony%20Tom%20Lantos%20Human%20Rights%20Commission%2028%20Nov%202012%20FINAL.pdf (referencing National Human Trafficking Resource Center data about human trafficking in the carnival industry); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1053, H-2B VISA PROGRAM: CLOSED CIVIL & CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD & ABUSE 6 (2010), www.gao.gov/new.items/d101053.pdf (*discussing its review of 10 closed civil and criminal cases of H-2B employers involved in forced or severely abusive labor situations*). *See generally* NAT'L GUESTWORKER ALLIANCE ET AL., *LEVELING THE PLAYING FIELD: REFORMING THE H-2B PROGRAM TO PROTECT GUESTWORKERS AND U.S. WORKERS* (2012), <http://www.guestworkeralliance.org/wp-content/uploads/2012/06/Leveling-the-Playing-Field-final.pdf> (*discussing issues and abuses with the H-2B guestworker program, providing worker stories, and a recommendations to improve the program*).

⁵² *See* Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503).

⁵³ *See id.*

⁵⁴ *See* Bayou Lawn & Landscape v. Solis, No. 3:12-cv-00183-MCR-CJK (N.D. Fl. Apr. 16, 2012).

⁵⁵ *See* Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. at 10,061.

⁵⁶ *See id.* at 10,076.

⁵⁷ *See id.* at 10,066.

H-2B employers paying piece-rate wages (wages based on unit produced or specific action performed) must guarantee that at the end of the week, the H-2B worker receives the same wage that a worker at an hourly rate would have made. *See* 29 C.F.R. § 503.16(a)(4) (2012). Workweeks are defined "as a regularly recurring period of 168 hours," or in other words, seven consecutive 24-hour days. Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. at 10,173.

⁵⁸ *See* Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. at 10,074-75.

⁵⁹ *See id.* at 10,079.

⁶⁰ *See id.*

The 2012 H-2B Regulations stipulate that during the period of employment, employers are required to comply with all other employment-related laws, including employment-related health and safety laws. *See* 29 C.F.R. § 503.16(z) (2013). Furthermore, employers are prohibited from confiscating or holding immigration documents. *See id.*

⁶¹ A single violation is defined as "the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition" *See* 29 C.F.R. § 503.23 (2013). The highest penalties are reserved for violations involving harm to U.S. workers. Employers would be penalized an amount equal to wage assessments for U.S. workers who were improperly laid off, not hired, or not rehired. *See id.*

⁶² *See* Compl. at ¶¶ 46-49, Bayou Lawn & Landscape Serv. v. Solis, No. 3:12-cv-00183-RV-CJK (N.D. Fl. Apr. 16, 2012); *see also* Compl. at ¶¶ 96-123, Louisiana Forestry Ass'n, Inc. v. Solis, No. 11-7687, 2012 WL 3562451 (E.D. Pa. Aug. 20, 2012) (challenging the 2011 prevailing wage regulations based on the argument that the DOL lacks rulemaking authority.).

⁶³ *See* Compl. at ¶¶ 46-49, Bayou Lawn & Landscape Serv., No. 3:12-cv-00183-MCR-CJK.

⁶⁴ *See* Bayou Lawn and Landscape Serv. v. Solis, No. 3:12-cv-183-MCR-CJK (N.D. Fla. Apr. 16, 2012), *appeal docketed*, No. 12-12462 (11th Cir. May 11, 2012).

⁶⁵ *See* Ruelas, *supra* note 49.

⁶⁶ Interview 23 (Oct. 20, 2012) (name has been changed to protect the identity of the worker).

⁶⁷ *See* Appendix B: Fair Employers' 2012 H-2B Labor Certification States and Their Fair Routes.

⁶⁸ *OFLC Case Disclosure Data*, *supra* note 48.

⁶⁹ See Compl. at ¶ 14, *Louisiana Forestry Ass’n, Inc. v. Solis*, No. 11-7687, 2012 WL 3562451 (E.D. Pa. Aug. 20, 2012) (“Many of the members are almost completely dependent on the availability of H-2B workers to perform the assembly and operation of rides, games, and cooking and service of food at these events, and few are able to find U.S., workers who are willing to take and stay in these temporary jobs that require travel from locale to locale.”); see also *id.*; Ruelas, *supra* note 49; Kevin Sieff, *Visa Issues Keep Carnival Workers From Crossing Borders*, HOUS. CHRON. (Mar. 28, 2008), <http://www.chron.com/news/nation-world/article/Visa-issue-keeps-carnival-workers-from-crossing-1760084.php#page=2>; Bill Hankins, *Congress leaves circuses hanging*, THE PARIS NEWS (Dec. 27, 2007), http://www.h2bworkforcecoalition.com/pdf/news/TX-Congress_leaves_circuses_hanging.pdf.

⁷⁰ *OFLC Case Disclosure Data*, *supra* note 48.

⁷¹ H-2B SELECTED STATISTICS, *supra* note 34.

⁷² *OFLC Case Disclosure Data*, *supra* note 48.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ NAME is a wholly owned subsidiary of Stone Canyon Entertainment Corp., a private company headquartered in Ridgeland, Massachusetts. See *Company Overview of North American Midway Entertainment LLC*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=12207190> (last visited Dec. 28, 2012); *Company Overview of Stone Canyon Entertainment Corp.*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=171893101> (last visited Nov. 6, 2012). NAME is headquartered in Farmland, Indiana, and is a combination of several midway entertainment companies: Farrow Amusement Company; Conklin Holdings, Inc.; Thebault-Blomsness, Inc. and affiliates; and Mid America Shows, Inc. See *Stone Canyon Entertainment Announces Majority Investment in Vacation Connection, LLC*, Business Wire (Jan. 27, 2006, 9:30 AM), <http://www.businesswire.com/news/home/20060127005257/en/Stone-Canyon-Entertainment-Announces-Majority-Investment-Vacation>; see also INDIANA SEC’Y OF STATE BUSINESS SERVICES DIVISION, IN.GOV, https://secure.in.gov/sos/online_corps/name_search.aspx (follow “Business Search” tab; then search “Enter Business Name to Start” for “North American Midway Entertainment”).

⁷⁷ In 2005, Astro Amusement Co., Inc. merged with NAME. See IOWA SECRETARY OF STATE, <http://sos.iowa.gov/search/business/> (search “Astro Amusement Co., Inc.,” follow “Business No. 310074” hyperlink).

⁷⁸ See John Green, *Manager’s Raise Tops Fair Board Items*, HUTCHINSON NEWS (Nov. 11, 2011), <http://hutchnews.com/Localregional/fair-board-meeting—12011-11-10T19-54-07>; see also Todd Pack, *Orange Cnty., Fla.-Based Carnival Company Begins its Annual Tour of Fairs*, THE ORLANDO SENTINEL, (Mar. 4, 2002), (ProQuest) (describing the

competition for contracts as “ferocious” and how Strates Shows, which has 16 contracts, lost a contract for the North Carolina State Fair that brought in \$2.25 million in profits; *Powers Great American Chosen to Run Midway at 2006 State Fair*, WRAL NEWS (Jan. 19, 2006), <http://www.wral.com/news/local/story/137001/>.

⁷⁹ Green, *supra* note 78. In 2010, NAME grossed over \$1.2 million at that same Kansas state fair. See Amy Bickel, *Fair Concerts, Carnival Fare Well*, HUTCHINSON NEWS (Sept. 10, 2010), <http://www.hutchnews.com/News/fair-numbers-so-far>.

⁸⁰ See *Fairs & Events*, N. AM. MIDWAY ENTMT, <http://www.namidway.com/fairs-events> (last visited Jan. 26, 2013); see also Appendix B: Fair Employers’ 2012 H-2B Labor Certification States and Their Fair Routes.

⁸¹ *Corporate: Our Business*, N. AM. MIDWAY ENTMT, <http://www.namidway.com/corporate/our-business> (last visited Jan. 26, 2013).

⁸² See Appendix B: Fair Employers’ 2012 H-2B Labor Certification States and Their Fair Routes; see also *Update from the OABA’s DC Lobbyist*, *supra* note 36.

⁸³ See EMP’T AND TRAINING ADMIN., U.S. DEP’T OF LABOR, APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION, ETA FORM 9142 (2013), http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142.pdf [hereinafter ETA FORM 9142].

⁸⁴ See Appendix B: Fair Employers’ 2012 H-2B Labor Certification States and Their Fair Routes; RCS, <http://midwaytickets.rcsfun.com/#> (last visited Jan. 17, 2012) (specific fairs include the Houston Fair, the Pima County Fair in Arizona, the San Diego County Fair, and the Antelope County Fair in Nebraska).

⁸⁵ See Appendix B: Fair Employers’ 2012 H-2B Labor Certification States and Their Fair Routes; REITHOFFER SHOWS, <http://reithoffershows.com/> (last visited Jan. 17, 2013).

⁸⁶ See Appendix B: Fair Employers’ 2012 H-2B Labor Certification States and Their Fair Routes; *Fairs and Events*, *supra* note 80.

⁸⁷ See Appendix B: Fair Employers’ 2012 H-2B Labor Certification States and Their Fair Routes. For a description of the labor certification process, see Appendix A: H-2B Labor Certification and Visa Application Process.

⁸⁸ Sieff, *supra* note 69.

⁸⁹ See S. POVERTY L. CTR., *supra* note 22, at 20; see also Ruelas, *supra* note 49.

⁹⁰ See Appendix C: DOL 2011 H-2B Labor Certifications and Associated Labor Agents.

⁹¹ See, e.g., Sieff, *supra* note 69 (describing the work of one recruiter who contracts with a few thousand workers each year from a small community in Mexico).

⁹² See *infra*, Part V, *Retaliation*.

⁹³ Ruelas, *supra* note 49.

⁹⁴ SECRETARÍA DE EDUCACIÓN PÚBLICA [SECRETARY OF PUBLIC EDUCATION], DIRECCIÓN GENERAL DE PLANEACIÓN Y ESTADÍSTICA EDUCATIVA [DEPARTMENT OF EDUCATIONAL PLANNING AND STATISTICS], www.dgpp.sep.gob.mx/estadistica.html (last visited Jan. 27, 2013).

⁹⁵ See, e.g., AARON TERRAZAS, DEMETRIOS G. PAPADEMETRIOU, & MARC R. ROSENBLUM, EVOLVING DEMOGRAPHIC AND HUMAN-CAPITAL TRENDS IN MEXICO AND CENTRAL AMERICA AND THEIR IMPLICATIONS FOR REGIONAL MIGRATION 1 (Migration Policy Institute ed. 2011).

⁹⁶ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: MEXICO 39 (2011), <http://www.state.gov/documents/organization/186738.pdf>.

⁹⁷ *Indicators: Poverty headcount ratio at rural poverty line (% of rural population)*, WORLD BANK GLOBAL POVERTY WORKING GRP., <http://data.worldbank.org/indicator/SI.POV.RUHC/countries/MX?display=graph> (last visited Jan. 17, 2013).

Fifteen percent of the Mexican population was living in extreme poverty, which the Mexican government defines “as those living on less than \$1.50 a day in rural areas and less \$2.00 a day in urban areas.” M. Angeles Villareal, *NAFTA and the Mexican Economy*, CONG. RESEARCH SERV., RL34733, at 5-6 fig.2 (2010), www.fas.org/sgp/crs/row/RL34733.pdf. Forty-seven percent of the population was living in moderate poverty, which “is defined as living on less than \$2.70 a day in rural areas and \$4.00 a day in urban areas.” *Id.*

⁹⁸ *Mexico: World Development Indicators*, WORLD BANK, <http://data.worldbank.org/country/mexico> (last visited Jan. 18, 2013).

⁹⁹ See *Economía [Economy]*, AYUNTAMIENTO DE TLAPACOYAN, VERACRUZ [TOWN COUNCIL OF TLAPACOYAN, VERACRUZ], <http://tlapacoyan.egobierno.gob.mx/> (last visited Jan. 16, 2012).

¹⁰⁰ Kevin Sieff, *Where hope lives: Big Top beckons carnival community; bureaucracy blocks the way*, BROWNSVILLE HERALD (Mar. 16, 2008), http://www.h2bworkforcecoalition.com/pdf/news/TX-Where_hope_lives_The_Brownsville_Herald.pdf (describing workers waiting for irregular day labor jobs in Tlapacoyan and making as little as \$1 USD, or approximately 13 MXN, per hour picking coffee).

¹⁰¹ Kevin Sieff, *Without worker visas businesses scramble to fill labor void*, THE BROWNSVILLE HERALD (Mar. 23, 2008), http://www.h2bworkforcecoalition.com/pdf/news/NA-Without_Worker_Visas.pdf.

¹⁰² *Enciclopedia de los Municipios de México: Estado de Zacatecas [Encyclopedia of the Municipalities of Mexico: State of Zacatecas]*, INSTITUTO NACIONAL PARA EL FEDERALISMO Y EL DESARROLLO MUNICIPAL [NATIONAL INSTITUTE FOR FEDERALISM AND MUNICIPAL DEVELOPMENT], <http://www.e-local.gob.mx/work/templates/enciclo/zacatecas/> (last visited Jan. 27, 2013).

¹⁰³ *Enciclopedia de los Municipios de México: Estado de Durango [Encyclopedia of the Municipalities of Mexico: State of Durango]*, INSTITUTO NACIONAL PARA EL FEDERALISMO Y EL

DESARROLLO MUNICIPAL [NATIONAL INSTITUTE FOR FEDERALISM AND MUNICIPAL DEVELOPMENT], <http://www.e-local.gob.mx/work/templates/enciclo/durango/> (last visited Jan. 27, 2013).

¹⁰⁴ Ricardo Vázquez, *Large contrasts in the state unemployment*, MEXICAN BUS. WEB (July 25, 2011), <http://www.mexicanbusinessweb.mx/eng/2012/large-contrasts-in-the-state-unemployment/>.

¹⁰⁵ See Interview 18 (Sept. 16, 2012); Interview 23 (Oct. 20, 2012); see also Ruelas, *supra* note 49.

Some workers also reported that while their intention was to send money home to their families, their earnings were not enough to do so. See Interview with Worker 14 (Aug. 31, 2012); Interview 25b (June/July 2012).

¹⁰⁶ Interview 14 (Aug. 31, 2012) (name has been changed to protect the identity of the worker).

¹⁰⁷ *Id.*

¹⁰⁸ For a more detailed discussion on the H-2B process, see Appendix A: H-2B Labor Certification and Visa Application Process.

¹⁰⁹ *Nonimmigrant Visa Statistics: FY 2011 Nonimmigrant Visas Issued*, U.S. DEP'T OF STATE <http://www.travel.state.gov/pdf/FY11NIVDetailTable.pdf> (last accessed Jan. 27, 2013).

¹¹⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 51; see also S. POVERTY L. CTR., *supra* note 22, at 9; APPENDIX A: H-2B LABOR CERTIFICATION AND VISA APPLICATION PROCESS.

¹¹¹ See Appendix A: H-2B Labor Certification and Visa Application Process.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ OFFICIAL VISA SERVICES OF THE U.S. OF AMERICA: MEXICO, http://usvisa-info.com/en-MX/selfservice/us_group_processing (last visited Jan. 17, 2013).

¹¹⁶ “Abuses suffered by temporary workers under the H-2 visa programs often begin in the workers’ countries of origin A workers’ recruitment experience may affect her employment experience in the United States, and workers who experience abuse in recruitment, often later experience abuse while employed in the U.S. with a visa.” See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE 4 (2013), http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf.

See also S. POVERTY L. CTR., *supra* note 22 (describing the imbalanced relationship between H-2B employers and workers because H-2B employers hold the “deportation card”); Julia Preston, *Labor Dept. Issues New Rules for Guest Workers*, N.Y. TIMES (Feb. 10, 2012), available at <http://www.nytimes.com/2012/02/11/us/rules-revised-for-h-2b-guest-worker-program.html>.

¹¹⁷ See Interview 2 (June 24, 2012) (name has been changed to protect the identity of the worker); Interview 15, (Sept. 9, 2012); Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker).

¹¹⁸ In fact, a recent survey of 220 H-2 workers revealed that approximately one in 10 Mexican workers had paid a recruitment fee for a nonexistent job. See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 4, 20-21.

¹¹⁹ Many labor agents exclusively recruit through word-of-mouth recommendations from “tried and true” workers. See, e.g., Ruelas, *supra* note 49.

¹²⁰ See Interview 14 (Aug. 31, 2012) (name has been changed to protect the identity of the worker); Interview 15 (Sept. 9, 2012); Interview 19 (Sept. 18, 2012); see also de Lira Aff. ¶ 3, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*; Carmona Aff. ¶ 3, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

¹²¹ This happens because employers may start the recruitment process before receiving DOL labor certifications for H-2B workers. The labor certification application does not require the names of each individual worker, and sometimes, DOL does not certify the employer for as many workers as the employer requests. See U.S. CITIZENSHIP AND IMMIGRATION SERV., U.S. DEP’T OF HOMELAND SEC., INSTRUCTIONS FOR FORM I-129, PETITION FOR A NONIMMIGRANT WORKER, <http://www.uscis.gov/files/form/i-129instr.pdf> (last accessed Jan. 27, 2013); *H-2B Certification for Temporary Non-Agricultural Work Details: Process for Filing*, EMP’T AND TRAINING ADMIN., U.S. DEP’T OF LABOR, http://www.foreignlaborcert.doleta.gov/h-2b_detail.cfm (last updated Oct. 16, 2012) [hereinafter *Process for Filing*]; see also CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 20-21.

¹²² See Interview 23 (Oct. 20, 2012) (name has been changed to protect the identity of the worker); Interview 24 (Oct. 20, 2012) (name has been changed to protect the identity of the worker); Interview 25b (Oct. 25, 2012) (name has been changed to protect the identity of the worker).

¹²³ See Am. Compl. at ¶ 20, *Rosales v. Geren Rides, Inc.*, No. 1:09-cv-01390-CAP (N.D. Ga. Sept. 8, 2009) (“Before coming to the U.S.... [workers] would meet at a location in Monterrey, Mexico with representatives of the SNE and, upon information and belief, a representative of defendant GRI. During this meeting, the visa applications of [workers] would be processed and arrangements would be made to transport the [workers] to the United States to commence working for defendant GRI....”); Compl. at ¶¶ 36-45, *Vitela v. Richardson*, 711 S.E.2d 760 (N.C. Ct. App. 2011) (describing that workers were met in Monterrey by Raul Hoffman, whom they understood to be a representative of the employer and that assisted with the visa interview and travel arrangement process).

¹²⁴ See Interview 2 (June 24, 2012) (name has been changed to protect the identity of the worker); Interview 4 (Aug. 24, 2012) (name has been changed to protect the

identity of the worker); Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker).

¹²⁵ Interview 2 (June 24, 2012) (name has been changed to protect the identity of the worker); Interview 12 (Aug. 29, 2012) (name has been changed to protect the identity of the worker); Interview 15, (Sept. 9, 2012); See Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker); see also CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 7-13.

¹²⁶ See Interview 2 (June 24, 2012) (name has been changed to protect the identity of the worker). It is unclear from worker interviews how much of the workers’ pre-employment costs were to pay recruitment fees. However, worker payment of recruitment fees beyond actual pre-departure expenses has also been documented by organizations working with H-2B workers. See, e.g., CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 4 (revealing that out of 220 H-2 workers interviewed, 58% reported paying an average of \$590 USD (approximately 7,582 MXN) in recruitment fees); see also S. POVERTY L. CTR., *supra* note 22, at 9. The charging of a recruitment fee as a condition of employment is prohibited. See U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 41.53 Notes, N2.2, <http://www.state.gov/documents/organization/87226.pdf> (last visited Jan. 19, 2013) [hereinafter FOREIGN AFFAIRS MANUAL]. The prohibition against H-2B applicants and employees paying such fees is strengthened in the 2012 H-2B Regulations, which require employers to contractually prohibit third-party recruiters or labor agents from charging such fees. See Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038, 10,056 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503).

¹²⁷ Am. Compl. at ¶ 23, *Rosales*, No. 1:09-cv-01390-CAP.

¹²⁸ See Interview 7 (Aug. 24, 2012) (name has been changed to protect the identity of the worker); Interview 25a (June/July 2012) (name has been changed to protect the identity of the worker); see also CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 4; S. POVERTY L. CTR., *supra* note 22, at 9; NAT’L GUESTWORKER ALLIANCE ET AL., *supra* note 51, at 15-16.

¹²⁹ See S. POVERTY L. CTR., *supra* note 22, at 9,19; see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 51.

¹³⁰ CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 18 (stating that “47% of workers surveyed reported having to take out a loan to cover pre employment expenses”).

¹³¹ See *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228, 1237 (11th Cir. 2002); see also WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, FIELD ASSISTANCE BULLETIN 2009-2, TRAVEL AND VISA EXPENSES OF H-2B WORKERS UNDER THE FLSA (2009), available at http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.htm#_ftnref3; WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #78: GENERAL REQUIREMENTS FOR EMPLOYERS PARTICIPATING IN THE H-2B PROGRAM (2012), available at <http://www.dol.gov/whd/regs/compliance/whdfs78.htm#UPDGjrQ9t94>.

¹³² See Interview 2 (June 24, 2012); Interview 4 (Aug. 24, 2012); Interview 14 (Aug. 31, 2012); Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker); see also 20 C.F.R. § 655.102(b)(5)(i) (2013); S. POVERTY L. CTR., *supra* note 22, at 9 (citing *Arriaga v. Florida Pacific Farms*, 305 F. 3d 1228, 1237 (11 th Cir. 2002)).

¹³³ Workers are typically instructed to apply for Mexican passports during the first stage of recruitment, if they do not already have one. Obtaining a passport financially strains workers, and while it is necessary in order to apply for a visa, there is no guarantee that the worker will ultimately get a visa and a job. The current cost of a Mexican passport is 955 MXN (approximately \$74.32 USD) for three years and 1,310 MXN (approximately \$101.95 USD) for six years. See *Pago de Derechos 2012* [Payment of Fees 2012], Secretaría de Relaciones Exteriores [Secretary of Foreign Affairs], <http://www.sre.gob.mx/index.php/pago-de-derechos-de-pasaporte> (last visited Jan. 27, 2013).

¹³⁴ See Interview 8 (Aug. 24, 2012) (name has been changed to protect the identity of the worker); Interview 15, (Sept. 9, 2012); Interview 17, (Sept. 16, 2012); Interview 25a (June/July 2012) (name has been changed to protect the identity of the worker).

¹³⁵ Petition on Labor Law Matters Arising in the U.S. to the National Administrative Office of Mexico under the North American Agreement on Labor Cooperation 11, ¶ 5 (Sept. 19, 2011) (on file with author).

¹³⁶ Am. Compl. at ¶ 23, *Rosales v. Geren Rides, Inc.*, No. 1:09-cv-01390-CAP (N.D. Ga. May 22, 2009).

¹³⁷ See Appendix C: DOL 2011 H-2B Labor Certifications and Associated Labor Agents.

¹³⁸ *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

¹³⁹ *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32. The primary international labor recruiter for the fair and carnival industry, James Judkins, began his career in the circus industry. Since becoming an H-2B labor recruiter, Judkins has recruited from the same Mexican communities as Carson & Barnes and his own circus did, including a small town in the state of Veracruz, where Judkins maintains an office. See *Where Hope Lives: Big Top Beckons Carnival Community; Bureaucracy Blocks the Way*, *supra* note 100. Aside from becoming the go-to labor contracting agent and recruiter for the amusement industry, Judkins has also taken an active leadership role in lobbying Congress and DOL to ensure that H-2B laws and regulations are favorable to traveling fair employers. Judkins is currently registered with the Federal Election Commission as OABA-PAC's treasurer. See *America's Fairs Carnivals and Circus's-PAC*, Committee ID: C00443887, FEDERAL ELECTION COMMISSION, http://query.nictusa.com/cgi-bin/com_detail/C00443887 (last visited Jan. 27, 2013). Judkins, in conjunction with OABA and the Small Business Workforce Alliance, has made substantive public comments to proposed changes in H-2B regulations by DHS and DOL in 2008 and 2011. See Robert Johnson,

OABA Public Comment to Proposed Changes to Wage Methodology for Temporary Non-agricultural Employment H-2B Program, (July 8, 2011) <http://www.regulations.gov/#!documentDetail;D=ETA-2011-0002-0041>; Robert Johnson, *OABA Public Comment to Proposed Labor Certification Process and Temporary Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the U.S. (H-2B Workers), and Other Technical Changes*, (Sept. 22, 2008) <http://www.regulations.gov/#!documentDetail;D=USCIS-2007-0058-0091>; John Meredith, *Small Business Workforce Alliance Public Comment to Proposed Labor Certification Process and Temporary Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the U.S. (H-2B Workers), and Other Technical Changes*, (Sept. 22, 2008) <http://www.regulations.gov/#!documentDetail;D=USCIS-2007-0058-0081>; James Kendrick Judkins, *JKJ Workforce Agency Public Comment to Proposed Labor Certification Process and Temporary Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the U.S. (H-2B Workers), and Other Technical Changes*, (Sept. 16, 2008) <http://www.regulations.gov/#!documentDetail;D=USCIS-2007-0058-0030>.

¹⁴⁰ *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

¹⁴¹ JKJ WORKFORCE AGENCY, DOCKET NO. USCIS-2007-0058, RIN 1615-AB67, COMMENTS TO PROPOSED REGULATIONS, CHANGES TO REQUIREMENTS AFFECTING H-2B NONIMMIGRANTS AND THEIR EMPLOYERS, Sept. 16, 2008.

¹⁴² *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

¹⁴³ *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

¹⁴⁴ See Franchise Tax Certification of Account Status, Seasonal Support Services, Inc., Texas Secretary of State File No. 0801022665 (listing registered agent Alejandro Trevino, Jr. at 32775 FM 106, RIO HONDO, TX 78583 filed on Aug. 27, 2008); Franchise Tax Certification of Account Status, Spectacular Solutions, Inc., Texas Secretary of State file number 0801022644 (listing registered agent James Kendrick Judkins at 32775 FM 106, RIO HONDO, TX 78583 filed on Aug. 27, 2008).

¹⁴⁵ In November 2011, Pierce used the OABA membership blog to advertise his workshop, *Mastering Hiring Practices*, informing amusement industry employers how to avoid employment law problems. *YOU'RE INVITED-Mastering Hiring Practices by Adventure Law*, YOUR OABA BLOG (Nov. 11, 2011), <http://youroaba.wordpress.com/2011/11/11/youre-invited-mastering-hiring-practices-by-adventure-law/>. Additionally, both men participated in an OABA and Small Business Workforce Alliance workshop entitled "What You Need to Know for Using Foreign Labor in 2012." "What You Need to Know for Using Foreign Labor in 2012", YOUR OABA BLOG, (Nov. 11, 2011), <http://youroaba.wordpress.com/2011/11/22/what-you-need-to-know-for-using-foreign-labor-in-2012/>.

¹⁴⁶ See Appendix C: DOL 2011 H-2B Labor Certifications and Associated Labor Agents.

¹⁴⁷ For a lengthier discussion of H-2 worker recruitment in Mexico, see CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116.

See Interview 2 (June 24, 2012); see also CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 150, at 11.

¹⁴⁸ See Richard Ruelas, *Step Right Up*..., ARIZ. REPUBLIC, E1, Apr. 10, 2011 (“[James Judkins] hires only new employees who are recommended by existing ones.”).

¹⁴⁹ Jorge Morales Almada, *A la segura con la H-2B*, IMMIGRATION EDUCATION AND GLOBALIZATION: U.S.-Mx (Feb. 19, 2008), <http://usmexico.blogspot.com/2008/02/la-segura-con-la-h-2b.html>.

¹⁵⁰ Sieff, *supra* note 69.

¹⁵¹ See Am. Compl. at ¶¶ 19-20, *Rosales v. Geren Rides, Inc.*, No. 1:09-cv-01390-CAP (N.D. Ga. May 22, 2009).

¹⁵² See, e.g., Interview 2 (June 24, 2012) (name has been changed to protect the identity of the worker). Although current H-2B regulations include a provision governing the number of hours workers must be guaranteed, that provision is enjoined by current litigation. See *supra* Part I, The Traveling Fair Industry and H-2B Workers, *DOL’s 2012 H-2B Regulations & Federal Litigation*.

¹⁵³ See, e.g., Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker) (describing other H-2B workers’ reluctance to come forward about their experiences in the fair and carnival industry because they do not want to jeopardize their chances of being selected for future employment by the local recruiter; see also Interview 25a (June/July 2012) (name has been changed to protect the identity of the worker) (explaining his belief that he has not been rehired for the last two fair seasons because he fell out of favor with powerful local recruiter).

¹⁵⁴ When one interviewee was asked if his coworkers might wish to be interviewed, he replied that workers are scared to come forward because they depend on the recruiter for work and do not want to jeopardize their relationship with the recruiter. See Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker).

¹⁵⁵ See Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker) (indicating that other workers were afraid to be interviewed for fear of harming their relationship with the recruiter and therefore, future chances of employment); see also Interviewer Outreach Reports, Sept. 16, 2012, Sept. 29, 2012, Oct. 3, 2012 (on file with authors).

¹⁵⁶ Interview 15 (Sept. 9, 2012).

¹⁵⁷ See OFFICE OF INSPECTOR GEN.—OFFICE OF AUDIT, U.S. DEP’T OF LABOR, MANAGEMENT OF H-2B PROGRAM NEEDS TO BE STRENGTHENED TO ENSURE ADEQUATE PROTECTIONS FOR U.S. WORKERS 7 (2012), <http://www.oig.dol.gov/public/reports/oa/2012/06-12-001-03-321>.

pdf (finding that 20 out of 33 H-2B employers audited had failed to pay their employees properly, including failure to pay prevailing and overtime wages); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 35 (REPORTING THAT H-2B EMPLOYERS HAD FAILED TO PAY THE PREVAILING HOURLY WAGE OR OVERTIME IN SIX OUT OF 10 CASES REVIEWED).

¹⁵⁸ See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2012); see also WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (2010), <http://www.dol.gov/whd/regs/compliance/wh11282.pdf> [hereinafter FLSA REFERENCE GUIDE].

¹⁵⁹ See 29 U.S.C. § 206.

¹⁶⁰ See 29 U.S.C. § 207.

¹⁶¹ See 29 U.S.C. § 216(b).

¹⁶² See 29 U.S.C. § 255(a).

¹⁶³ See FLSA REFERENCE GUIDE, *supra* note 158.

¹⁶⁴ See 29 U.S.C. § 213.

¹⁶⁵ 29 U.S.C. § 213(a)(3); WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #18: SECTION 13(A)(3) EXEMPTION FOR SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), <http://www.dol.gov/whd/regs/compliance/whdfs18.pdf> [hereinafter FACT SHEET #18].

¹⁶⁶ 29 U.S.C. § 213(a)(3).

¹⁶⁷ Carmona Aff. ¶¶ 2,16, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

¹⁶⁸ *Fair Labor Standards Act Advisor: What is the Minimum Wage?*, OFFICE OF THE ASSISTANT SEC’Y FOR POLICY, U.S. DEP’T OF LABOR, <http://www.dol.gov/elaws/faq/esa/flsa/001.htm> (last visited Jan. 27, 2013) (providing that the federal minimum wage increased in July 2007, during the period Carmona was employed by Dreamland, from \$5.15 to \$5.85 USD, approximately 66 to 75 MXN, an hour).

¹⁶⁹ See Carmona Aff. ¶¶ 11-25, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

¹⁷⁰ FACT SHEET #18, *supra* note 165.

¹⁷¹ See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (“[T]he application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.”).

¹⁷² This is especially problematic because employers are only required to prove exemption during DOL audits, which are infrequent, or if they are taken to court. See *Wages and Hours Worked: Wages under Foreign Labor Certification*, U.S. DEP’T OF LABOR, <http://www.dol.gov/compliance/topics/wages-foreign-workers.htm> (last visited Jan. 27, 2013). See *infra* Part III, Wage and Hour Abuses, *Inadequate Enforcement and Oversight* for more information on the attestation-based process.

¹⁷³ See, e.g., Interview 16 (June/July 2012). After having worked in the U.S. for seven seasons, H-2B worker Miguel knew to keep track of his pay so that he could successfully contest any unfair deductions. See Interview 1 (June 24, 2012) (name has been changed to protect the identity of the worker).

¹⁷⁴ See 29 C.F.R. § 516.2 (2013) (regulating the records to be kept by employers for their employees subject to minimum wage and overtime hours).

¹⁷⁵ *Minimum Wage Laws in the States – Jan. 1, 2013*, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minwage/america.htm> (last visited Jan. 27, 2013).

¹⁷⁶ *Id.*

¹⁷⁷ See MONT. CODE ANN. § 39-3-405 (2011) (Montana's overtime law provides a special rule for student employees of amusement establishments.).

¹⁷⁸ See MONT. CODE ANN. § 39-3-409.

¹⁷⁹ See MD. LAB. AND EMPL. CODE ANN. §§ 3-413, 415 (2012).

¹⁸⁰ Interview 15 (Sept. 9, 2012).

¹⁸¹ Interview 14 (Aug. 31, 2012) (name has been changed to protect the identity of the worker).

¹⁸² See Interview 1 (June 24, 2012); Interview 2 (June 24, 2012); Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 11 (Aug. 24, 2012); Interview 12 (Aug. 29, 2012); Interview 19 (Sept. 18, 2012).

¹⁸³ See Interview 1 (June 24, 2012); Interview 2 (June 24, 2012); Interview 4 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 11 (Aug. 24, 2012); Interview 12 (Aug. 29, 2012); Interview 19 (Sept. 18, 2012).

¹⁸⁴ See, e.g., Art Levine, *Shocking State Fair Scandal, Wage Theft Epidemic, Spur Nationwide Protests*, TRUTHOUT (Nov. 12, 2010), <http://archive.truthout.org/shocking-state-fair-scandal-wage-theft-epidemic-spur-nationwide-protests65115> (last visited Jan. 13, 2013) (discussing the workers held in slavery-like conditions and made to work approximately 100 hours a week by a food vendor at the New York State Fair); see also Interview 1 (June 24, 2012) (who worked approximately 15 hours daily); Interview 3 (Aug. 24, 2012) (who worked approximately 16 hours daily); Interview 9 (Aug. 24, 2012) (who worked approximately 17 hours daily); Interview 13 (Aug. 31, 2012) (who worked approximately 11 hours daily); Interview 19 (Sept. 18, 2012) (who worked approximately 17 hours daily); Interview 25a (June/July 2012) (who worked approximately 13 hours daily).

¹⁸⁵ See Interview 10 (Aug. 24, 2012) (name has been changed to protect the identity of the worker) (This worker was also paid \$320 USD, or 4,112 MXN, per week.).

¹⁸⁶ See Interview 6 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 13 (Aug. 31, 2012); Interview 17 (Sept. 16, 2012); Interview 25a (June/July 2012).

¹⁸⁷ See Interview 1 (June 24, 2012); Interview 2 (June 24, 2012); Interview 3 (Aug. 24, 2012); Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 8 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 10 (Aug. 24, 2012); Interview 11 (Aug. 24, 2012); Interview 12 (Aug. 29, 2012); Interview 13 (Aug. 31, 2012); Interview 14 (Aug. 31, 2012); Interview 15 (Sept. 9, 2012); Interview 16 (June/July 2012); Interview 17 (Sept. 16, 2012); Interview 18 (Sept. 16, 2012); Interview 19 (Sept. 18, 2012); Interview 21 (Sept. 22, 2012); Interview 22 (Oct. 20, 2012); Interview 23 (Oct. 20, 2012); Interview 24 (Oct. 20, 2012); Interview 25a (June/July 2012); Interview 25b (Oct. 25, 2012).

¹⁸⁸ See Interview 5 (Aug. 24, 2012); Interview 21 (Sept. 22, 2012); see also Ruelas, *supra* note 49 (describing how H-2B workers deconstruct the rides rapidly after the close of the fair, for example, from 10 p.m. to 3 a.m.).

¹⁸⁹ See, e.g., Ruelas, *supra* note 49 (describing how H-2B workers deconstruct the rides rapidly after the close of the fair, for example, from 10 p.m. to 3 a.m.); see also Sieff, *supra* note 69; Interview 1 (June 24, 2012); Interview 2 (June 24, 2012); Interview 3 (Aug. 24, 2012); Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 6 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 8 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 10 (Aug. 24, 2012); Interview 11 (Aug. 24, 2012); Interview 12 (Aug. 29, 2012); Interview 13 (Aug. 31, 2012); Interview 15 (Sept. 9, 2012); Interview 16 (June/July 2012); Interview 17 (Sept. 16, 2012); Interview 18 (Sept. 16, 2012); Interview 19 (Sept. 18, 2012); Interview 21 (Sept. 22, 2012); Interview 22 (Oct. 20, 2012); Interview 23 (Oct. 20, 2012); Interview 24 (Oct. 20, 2012); Interview 25a (June/July 2012); Interview 25b (Oct. 25, 2012). Some workers' names have been changed to protect their identities.

¹⁹⁰ ETA FORM 9142, *supra* note 83.

¹⁹¹ For more information on the attestation-based process, see *infra* Part III, Wage and Hour Abuses, *Inadequate Enforcement and Oversight*.

¹⁹² *May 2011 Occupational Employment and Wage Estimates*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, http://www.bls.gov/oes/oes_dl.htm (last visited Jan. 27, 2013) (select "National Cross-Industry Estimates"). According to O*NET, the national median hourly wage for amusement and recreation attendants was \$8.97 USD (approximately 115 MXN).

¹⁹³ See FOREIGN AFFAIRS MANUAL, *supra* note 126, at N27.1.

¹⁹⁴ See Interview 24 (Oct. 20, 2012) (name has been changed to protect the identity of the worker); Interview Worker 25a (June/July 2012) (name has been changed to protect the identity of the worker).

¹⁹⁵ See Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038, 10,066 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503). The job opportunity offered to the H-2B worker must be for at least 35 hours of work per workweek. Workweeks are defined “as a regularly recurring period of 168 hours,” or in other words, seven consecutive 24-hour days. The 2012 H-2B Regulations would require that all H-2B employers guarantee workers pay for at least three-fourths of the hours offered with the job opportunity. This means that for every 12-week period, workers must be paid for the total number of hours equal to three-fourths of the workdays in that period. If the job order were for a workweek of 5 days a week and 8 hours per day, the employer would have to guarantee a worker 360 hours during every 12-week period. (12 weeks x 40 hours = 480 hours x 75 percent = 360 hours) See 29 C.F.R. § 503.16.

¹⁹⁶ See Interview 1 (June 24, 2012); Interview 2 (June 24, 2012); Interview 3 (Aug. 24, 2012); Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 6 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 8 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 10 (Aug. 24, 2012); Interview 11 (Aug. 24, 2012); Interview 12 (Aug. 29, 2012); Interview 13 (Aug. 31, 2012); Interview 15 (Sept. 9, 2012); Interview 16 (June/July 2012); Interview 17 (Sept. 16, 2012); Interview 18 (Sept. 16, 2012); Interview 19 (Sept. 18, 2012); Interview 21 (Sept. 22, 2012); Interview 22 (Oct. 20, 2012); Interview 23 (Oct. 20, 2012); Interview 24 (Oct. 20, 2012); Interview 25a (June/July 2012); Interview 25b (Oct. 25, 2012).

¹⁹⁷ Interview 18 (Sept. 16, 2012) (name has been changed to protect the identity of the worker).

¹⁹⁸ de Lira Aff. ¶¶ 16-17, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

¹⁹⁹ Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

²⁰⁰ Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

²⁰¹ See U.S. DEP’T OF LABOR, WAGE AND HOUR DIVISION, FIELD ASSISTANCE BULLETIN No. 2009-2 (2009), available at http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.htm.

²⁰² Interview 20 (Sept. 19, 2012) (name has been changed to protect the identity of the worker). This type of withholding is not uncommon with H-2B employers. See, e.g., Secretaria del Trabajo y Previsión Social [Secretary of Labor and Social Welfare], Informe de Revisión de las Comunicaciones Publicas [Report of the Review of Public Communications] Mex 2003-1, Mex 2005-1, Y Mex 2011-1 de la Oficina Administrativa Nacional de México al Amparo del Aclan [National Administrative Office under Aclan] 7, 45 (2012) (translated by author).

²⁰³ Interview 16 (June/July 2012).

²⁰⁴ Jaime received a weekly cash payment of \$283 USD (approximately 3,637 MXN). At the number of hours Jaime worked weekly, anywhere from 63 to 91, Jaime was effectively earning approximately \$3.10 to \$4.49 (approximately 40 to 58 MXN) per hour. Interview 18 (Sept. 16, 2012) (name has been changed to protect the identity of the worker).

²⁰⁵ Carmona Aff. ¶ 3, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

²⁰⁶ See *id.* at ¶¶ 16-21.

²⁰⁷ *Id.* at ¶18.

²⁰⁸ See, e.g., Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker); see also *id.* at ¶¶ 3, 16-21.

²⁰⁹ Employer retaliation against workers is discussed *infra*, Part V, Retaliation.

²¹⁰ “Other limitations for migrant workers to assert their rights are language barriers, seven day workweeks, and constantly changing work sites for those working in carnivals.” Secretaria del Trabajo y Previsión Social [Secretary of Labor and Social Welfare], Informe de Revisión de las Comunicaciones Publicas [Report of the Review of Public Communications] Mex 2003-1, Mex 2005-1, Y Mex 2011-1 de la Oficina Administrativa Nacional de México al Amparo del Aclan [National Administrative Office under Aclan] 10 (2012) (translated by author).

²¹¹ Most H-2B workers interviewed mentioned only having access to employer-supplied transportation, often limited and usually to acquire basic necessities only. See Interview 5 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 20 (Sept. 19, 2012); Interview 23 (Oct. 20, 2012); Interview 24 (Oct. 20, 2012); Interview 25b (Oct. 25, 2012).

²¹² See *Fact Sheet on the Legal Services Corporation*, LEGAL SERV. CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Jan. 15, 2013).

²¹³ Act of Apr. 26, 1996, Pub. L. No. 104-134, §504(a)(11), 110 Stat. 1321 (1996).

²¹⁴ *About Statutory Restrictions on LSC-funded Programs*, LEGAL SERV. CORP., <http://www.lsc.gov/media/fact-sheets/statutory-restrictions-lsc-funded-programs> (last visited Jan. 13, 2013).

²¹⁵ See S. POVERTY L. CTR., *supra* note 22, at 1, 30.

²¹⁶ See *id.*

²¹⁷ 45 C.F.R. § 1626.1-1626.12 (2013).

²¹⁸ 8 C.F.R. § 214.2(h)(6)(i)(A) (2013).

²¹⁹ *Prevailing Wages (PERM, H-2B, H-1B, H-1B1 and E-3)*, EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, <http://www.foreignlaborcert.doleta.gov/pwscreens.cfm> (last updated June 25, 2012).

²²⁰ Setting the prevailing wage for H-2B workers is a hotly contested issue, and finalizing how to determine the prevailing wage for H-2B workers is currently being litigated. In 2008, President George W. Bush's administration promulgated the regulations that currently govern the H-2B program. A series of lawsuits has delayed DOL implementation of the new prevailing wage rule. The legal and administrative delays in implementing the rule show how much is at stake. Employers claim that the new prevailing wage determination would render H-2B visas useless because they would be unable to pay the workers. However, as this report highlights, businesses that utilize the H-2B program are well funded and organized against efforts to improve laws affecting H-2B workers. *See* Comité de Apoyo a los Trabajadores Agrícolas v. Solis, No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010); *supra* Part I, *Federal Litigation over the Dep't of Labor's 2012 H-2B Rule*.

²²¹ For example, a traveling fair company employing workers interviewed for this report did not have DOL certifications for at least one of the states where those workers had been employed. *See, e.g.*, Interview 17 (Sept. 16, 2012) (The company employing this worker was only certified in Florida, though the worker had worked in Maryland, among other states); *see also* Appendix A: H-2B Labor Certification and Visa Application Process.

²²² *See* ETA FORM 9142, *supra* note 83; *see also* H-2B Certification for Temporary Non-Agricultural Work, *supra* note 32.

²²³ *Wages and Hours Worked: Wages under Foreign Labor Certification*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/topics/wages-foreign-workers.htm> (last visited Jan. 27, 2013).

²²⁴ *See, e.g.*, Department of Labor, Employment & Training Administration, General Administrative Letter No. 1-95, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations, *available at* http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=393.

²²⁵ *See* Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing (H-2B Workers), 73 Fed. Reg. 78,019 (Dec. 19, 2008) (to be codified at 20 C.F.R. pts. 655, 656).

²²⁶ The "2009 H-2B Regulations" were issued on December 19, 2008 with an effective date of January 18, 2009. *Id.*

²²⁷ OFFICE OF INSPECTOR GEN., *supra* note 157, at 2-5.

²²⁸ *See* OABA Public Comment to Proposed Changes to Wage Methodology for Temporary Non-agricultural Employment H-2B Program, *supra* note 139.

²²⁹ Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date, 77 Fed. Reg. 60,040 (Oct. 12, 2012) ("The effective date for the final rule amending 20 CFR part 655, published at 76 FR 3452, January 19, 2011, effective January 1, 2012, amended to September 30, 2011, at 76 FR 45667, August

1, 2011, delayed until November 30, 2011, at 76 FR 59896 (September 28, 2011), delayed until January 1, 2012, at 76 FR 73508 (November 29, 2011), and delayed until October 1, 2012 at 76 FR 82115 (December 30, 2011), is further delayed until March 27, 2013.").

²³⁰ *See* Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038, 10,106 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503).

²³¹ *See Wage and Hour Division History*, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/about/history/whdhist.htm#UPHIRbQ9t94> (last visited Jan. 27, 2013); *see also* Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 76 Fed. Reg. 15,130, 15,131 (Mar. 18, 2011) (to be codified at 29 C.F.R. pt. 503, 20 C.F.R. pt. 655).

DHS delegated this authority, including enforcing compliance with H-2B petition and temporary labor certification requirements, to DOL pursuant to 8 U.S.C. 1184(c)(14) (B) and 8 U.S.C. 1103(a)(6). *See* WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FACT SHEET #69: REQUIREMENTS TO PARTICIPATE IN THE H-2B PROGRAM (2009), <http://www.dol.gov/whd/regs/compliance/whdfs69.pdf> [hereinafter FACT SHEET #69]. The H-2B petition and temporary labor certification processes are described in detail *infra* Appendix A: H-2B Labor Certification and Visa Application Process.

²³² *Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act, Hearing before the Subcomm. on Education and the Workforce*, 122d Cong. (2011), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70971/html/CHRG-112hhrg70971.htm>; *see also* BRIDGE TO JUSTICE: Wage and Hour Connects Workers to New ABA-Approved Attorney Referral System, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/resources/ABAREferralPolicy.htm#UPTMiLQ9t94> (last visited Jan. 27, 2013).

²³³ *See* S. POVERTY L. CTR., *supra* note, 22 at 29 (discussing the Southern Poverty Law Center's belief that there was very little investigation of H-2B employers based on no available data and the organization's experience in the field); *see also* BRENNAN CTR. FOR JUSTICE, TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEP'T OF LABOR, 1975-2004, ECONOMIC POLICY BRIEF, No. 3, (2005), http://www.brennancenter.org/page/-/d/download_file_35553.pdf (last visited Jan. 12, 2013) (documenting the downward trend in DOL WHD enforcement of employment laws over the last three decades, despite the increase in the number of workers and workplaces).

²³⁴ *Wage and Hour Compliance Action Data (2012)*, U.S. DEP'T OF LABOR, http://ogesdw.dol.gov/data_summary.php (last visited Jan. 27, 2013).

²³⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, DEP'T OF LABOR: WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 18 (2009), <http://www.gao.gov/assets/130/122107.pdf>.

²³⁶ From 1975 to 2004, the number of workers and workplaces expanded by an estimated 55 and 112 percent. See BRENNAN CTR. FOR JUSTICE, *supra* note 233.

²³⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08962T, FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 1 (2008), <http://www.gao.gov/new.items/d08962t.pdf> [hereinafter GAO-08962T].

²³⁸ *Id.*

H-2B workers can file a complaint with WHD via the DOL's toll-free helpline, through which they will be directed to one of WHD's 200 offices nationwide. See *How to File a Complaint*, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, <http://www.dol.gov/wecanhelp/howtofilecomplaint.htm> (last visited Jan. 14, 2013). However, GAO has found that the helplines are not being managed effectively to provide meaningful access to complainants. See GAO-08962T, *supra* note 237.

²³⁹ See GAO-08962T, *supra* note 237, at 1; see also WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #44: VISITS TO EMPLOYERS (2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs44.htm#UPShHLQ9t94>.

²⁴⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-629, WAGE AND HOUR DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT 2 (2009), <http://www.gao.gov/assets/300/291496.pdf>.

²⁴¹ See BRENNAN CTR. FOR JUSTICE, *supra* note 233.

²⁴² See *News Release: Statement by Secretary of Labor Hilda L. Solis on Wage and Hour Division's increased enforcement and outreach efforts*, U.S. DEP'T OF LABOR (Nov. 19, 2009), available at <http://www.dol.gov/opa/media/press/whd/whd20091452.htm#UPTTA9t94>.

²⁴³ See OFFICE OF FOREIGN LABOR CERTIFICATION, ANNUAL REPORT, OCT. 1, 2010 – SEPT. 30, 2011 (2011), http://www.foreignlaborcert.doleta.gov/pdf/2011AR_FINAL.pdf; see also Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 76 Fed. Reg. 15,130, 15,134 (Mar. 18, 2011) (to be codified at 29 C.F.R. pt. 503, 20 C.F.R. pt. 655), http://www.foreignlaborcert.doleta.gov/pdf/2011_6152.pdf.

²⁴⁴ See *Process for Filing*, *supra* note 121; see also OFFICE OF INSPECTOR GEN., *supra* note 157, at 1. DOL recognizes the increased potential for fraud and abuse with the attestation-based model and therefore, reverted to its compliance-based program via the 2012 H-2B Regulations. With the compliance-based system, DOL requires documentation demonstrating compliance with H-2B program requirements prior to issuance of a labor certification. See Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038, 10,040 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503). However, implementation of these regulations is stalled due to federal litigation and therefore, DOL continues to use the attestation-based system in the interim.

²⁴⁵ See FACT SHEET #69, *supra* note 231; see also *Process for Filing*, *supra* note 121; OFFICE OF INSPECTOR GEN., *supra* note 157, at 1; *Work Authorization for Non-U.S. Citizens: Temporary*

Non-Agricultural Workers (H-2B Visas), OFFICE OF THE ASSISTANT SEC'Y FOR POLICY, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/guide/tnw.htm> (last updated Sept. 2009); ETA FORM 9142, *supra* note 83; EMP'T AND TRAINING ADMIN., U.S. DEP'T OF LABOR, APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION, ETA FORM 9142, APPENDIX B.1 (2013), http://www.foreignlaborcert.doleta.gov/pdf/eta_form_9142_appendix_b1.pdf [hereinafter ETA FORM 9142, APPENDIX B.1].

²⁴⁶ See FACT SHEET #69, *supra* note 231; see also *Process for Filing*, *supra* note 121; OFFICE OF INSPECTOR GEN., *supra* note 157, at 1; *Work Authorization for Non-U.S. Citizens: Temporary Non-Agricultural Workers (H-2B Visas)*, *supra* note 245; ETA FORM 9142, *supra* note 83; ETA FORM 9142, APPENDIX B.1, *supra* note 245.

²⁴⁷ See *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32; see also OFFICE OF INSPECTOR GEN., *supra* note 157, at 1.

²⁴⁸ OFFICE OF INSPECTOR GENERAL—OFFICE OF AUDIT, U.S. DEP'T OF LABOR, PROGRAM DESIGN ISSUES HAMPERED ETA'S ABILITY TO ENSURE THE H-2B VISA PROGRAM PROVIDED ADEQUATE PROTECTIONS FOR U.S. FORESTRY WORKERS IN OREGON 2 (2011), <http://www.oig.dol.gov/public/reports/oa/2012/17-12-001-03-321.pdf>.

²⁴⁹ Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 76 Fed. Reg. 15,130, 15,159 (Mar. 18, 2011) (to be codified at 29 C.F.R. pt. 503, 20 C.F.R. pt. 655).

²⁵⁰ See *id.* at 15,132.

²⁵¹ See OFFICE OF INSPECTOR GEN., *supra* note 157, at 1.

²⁵² See *id.* at 8. Anecdotal information from OABA to its members indicates that carnival employers may have been among the subjects of the audit. See *Audit Alert ... H-2B Program Users*, YOUR OABA BLOG (June 5, 2012), <https://youroaba.wordpress.com/2012/06/05/audit-alert-h-2b-program-users/>.

²⁵³ 20 C.F.R. § 655.1312 (2009).

²⁵⁴ See OFFICE OF INSPECTOR GEN., *supra* note 157, at 1.

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ Interview 6 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

²⁵⁸ Interview 19 (Sept. 18, 2012).

²⁵⁹ See *Summary Report for: 39-3091.00—Amusement and Recreation Attendants*, *supra* note 14.

²⁶⁰ See *id.*

²⁶¹ See Interview 5 (Aug. 24, 2012); Interview 6 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 13 (Aug. 31, 2012).

²⁶² See Interview 1 (June 24, 2012); Interview 6 (Aug. 24, 2012); Interview 15 (Sept. 9, 2012); Interview 16 (June/July 2012).

²⁶³ See Interview 12 (Aug. 29, 2012) (name has been changed to protect the identity of the worker) (describing how travel days were his only “day off,” and he would be expected to work the following day, upon arrival at the new fair site).

²⁶⁴ See *Fatality and Catastrophe Investigation Summaries*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, <http://www.osha.gov/pls/imis/accidentsearch.html> (last visited Jan. 25, 2013) (follow “A” hyperlink found under “Keyword List”; follow “Amuse Park/Carnival” link) (providing a list of all worker injuries and fatalities that have been investigated at amusement parks and carnivals since 1984).

²⁶⁵ See Interview 14 (Aug. 31, 2012); Interview 21 (Sept. 22, 2012).

²⁶⁶ Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593 (May 11, 2012) (to be codified 22 C.F.R. pt. 62), <http://j1visa.state.gov/wp-content/uploads/2012/05/2012-swt-ifr.pdf>.

²⁶⁷ See Occupational Safety and Health Act, 29 U.S.C. §§ 651, 677 (2012).

²⁶⁸ See *Fatality and Catastrophe Investigation Summaries*, *supra* note 264.

²⁶⁹ See Interview 1 (June 24, 2012); Interview 6 (Aug. 24, 2012); Interview 15 (Sept. 9, 2012); Interview 16 (June/July 2012). Some of the names have been changed to protect the identity of the workers.

²⁷⁰ Workers often report being shown by another worker how to assemble and operate a ride. See de Lira Aff. ¶¶ 29-31, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*; see also Interview 6 (Aug. 24, 2012); Interview 16 (June/July 2012); Interview 19 (Sept. 18, 2012); Interview 20 (Sept. 19, 2012); Interview 23 (Oct. 20, 2012); Interview 25b (Oct. 25, 2012); see also Ruelas, *supra* note 49.

²⁷¹ See Interview 14 (Aug. 31, 2012); Interview 19 (Sept. 18, 2012); Interview 24 (Oct. 20, 2012).

²⁷² See Interview 4 (Aug. 24, 2012).

²⁷³ Assurance of Discontinuance at ¶ 21, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

²⁷⁴ Carmona Aff. ¶ 39, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*; see also Interview 16 (June/July 2012); Interview 19 (Sept. 18, 2012).

²⁷⁵ Interview 16 (Sept. 13, 2012) (name has been changed to protect the identity of the worker).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See Interview 1 (June 24, 2012) (eye injury requiring surgery); Interview 13 (Aug. 31, 2012) (foot injury); Interview 7 (Aug. 24, 2012) (wrist injury); Interview 19 (Sept. 18, 2012) (hip injury due to a fall); Interview 22 (Oct. 20, 2012) (struck by a moving part); Interview 23 (Oct. 20, 2012) (tailbone injury due to a fall); Interview 18 (Sept. 16, 2012) (suffered several falls).

²⁷⁹ Interview 19 (Sept. 18, 2012).

²⁸⁰ See Assurance of Discontinuance, ¶ 21, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

²⁸¹ Sara Gregory, *Police: Malfunctioning Cable May Have Caused Carnival Worker’s Death*, ACCESS SAFETY (May 17, 2011), available at <http://accesssafety.biz/workplace-safety/police-malfunctioning-cable-may-have-caused-carnival-workers-death-news-record-com-greensboro-the-triads-most-trusted-source-for-local-news-and-analysis/657> (last visited Jan. 15, 2013) (The deceased carnival worker was not an H-2B worker, but his death illustrates the inherent danger present in the amusement industry).

²⁸² Amusement ride accidents are so prevalent that a website has been established to compile news reports of them with the goal of raising awareness of the risks associated with amusement rides in order to prevent future accidents. See RIDEACCIDENTS.COM, <http://www.rideaccidents.com/> (last visited Jan. 15, 2013).

²⁸³ See *OSHA in the Amusement Industry?*, ENTERTAINMENT SAFETY SOLUTIONS BLOG (July 14, 2011), <http://www.entertainsafety.com/blog/2011/07/osha-in-the-amusement-business/#FN1>.

²⁸⁴ *OSHA Regional News Release: U.S. Dep’t of Labor’s OSHA Cites Reithoffer Shows for Workplace Safety and Health Hazards at Philadelphia and Bensalem, PA Carnivals*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR (Sept. 10, 2007), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=14465. Under OSHA regulations, “serious violations are issued when there is a substantial probability that death or serious injury could occur from a hazard about which the employer knew or should have known.” *Id.*

²⁸⁵ See *id.*

²⁸⁶ Kate White, *Company that Hires State Fair Workers Facing Complaint*, CHARLESTON GAZETTE (Oct. 8, 2011), available at <http://wvgazette.com/News/201110073533>; see also *Update: Federal Agency Investigating W.Va. State Fair Ride Accident*, WSAZ NEWSCHANNEL 3HD (Aug. 24, 2011, 1:29 PM), <http://www.wsaz.com/news/headlines/128195993.html>.

²⁸⁷ It is estimated that 2,500 non-occupational injuries were treated in emergency hospital rooms in 2004. See MARK S. LEVINSON, CONSUMER PROD. SAFETY COMM’N, AMUSEMENT RIDE-RELATED DEATHS IN THE U.S.: 2005 UPDATE 5 (2005), <http://www.cpsc.gov/library/amus2005.pdf>. Between 1987 and 2002 “[t]here were 57 reported non-occupational fatalities from mobile and fixed-site rides combined.” *Id.* at 7.

²⁸⁸ See C. CRAIG MORRIS, CONSUMER PROD. SAFETY COMM'N, AMUSEMENT RIDE-RELATED INJURIES AND DEATHS IN THE U.S.: 1987-1999 12 (2000), <http://www.cpsc.gov/library/foia/foia00/os/amusemnt.pdf>; see also Patricia Ziminski, Note, *Are we Being Taken for a Ride?—The Need for Uniform Regulation in the Recreational Industry*, 51 SYRACUSE L. REV. 883, 899 (2001).

²⁸⁹ See LEVINSON, *supra* note 287, at 5.

²⁹⁰ Interview 14 (Aug. 31, 2012) (name has been changed to protect the identity of the worker).

²⁹¹ Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

²⁹² Interview 14 (Aug. 31, 2012) (name has been changed to protect the identity of the worker).

²⁹³ Carmona ¶ 29, *In re Investigation of Andrew W. Cuomo, Att'y Gen. of N.Y., of Dreamland Amusements, Inc.*

²⁹⁴ See, e.g., First Am. Compl. at ¶ 28, *Rosales v. Geren Rides, Inc.*, No. 1:09-cv-01390-CAP (N.D. Ga. May 22, 2009) (“[Workers] worked an average of 12 hours per day, 7 days per week—for an average of 84 hours of work per week.”); see also Interview 1 (June 24, 2012) (who worked approximately 15 hours daily); Interview 3 (Aug. 24, 2012) (who worked approximately 16 hours daily); Interview 9 (Aug. 24, 2012) (who worked approximately 17 hours daily); Interview 13 (Aug. 31, 2012) (name has been changed to protect the identity of the worker) (who worked approximately 11 hours daily); Interview 19 (Sept. 18, 2012) (who worked approximately 17 hours daily); Interview 25a (June/July 2012) (who worked approximately 13 hours daily).

²⁹⁵ One H-2B worker described riding along with as many as 17 others in a van designed for 8 to 10 people. See Carmona Aff. ¶ 29, *In re the Investigation of Andrew W. Cuomo, Att'y Gen. of N.Y., of Dreamland Amusements Inc.*

²⁹⁶ See Interview 5 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 20 (Sept. 19, 2012); Interview 23 (Oct. 20, 2012); Interview 24 (Oct. 20, 2012); Interview 25b (Oct. 25, 2012).

²⁹⁷ See Interview 23 (Oct. 20, 2012) (name has been changed to protect the identity of the worker).

²⁹⁸ de Lira Aff. ¶ 28, *In re the Investigation of Andrew W. Cuomo, Att'y Gen. of N.Y., of Dreamland Amusements Inc.*

²⁹⁹ Carmona Aff. ¶ 38, *In re the Investigation of Andrew W. Cuomo, Att'y Gen. of N.Y., of Dreamland Amusements Inc.* (Carmona was told he would not receive income tax reimbursements as a result of his 2-day stay in a hospital); see also Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

³⁰⁰ See SMALL URBAN & RURAL TRANSIT CTR. ET AL., RURAL TRANSIT FACTBOOK 2011 3 (2011), http://www.surtrc.org/transit-factbook/downloads/2011_RuralTransitFactBook.pdf (reporting that fewer than 1 percent of rural residents use public transportation to get to work); see also S. POVERTY L. CTR., *supra* note 22, at 31 (noting that workers are often geographically isolated, presenting a significant practical challenge to accessing services).

³⁰¹ Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

³⁰² See *id.*

³⁰³ Eisenstadt, *supra* note 2; see also Interview 4 (Aug. 24, 2012); Interview 16 (June/July 2012); Interview 21 (Sept. 22, 2012). Some of the names have been changed to protect the identity of the workers.

³⁰⁴ See Interview 12 (Aug. 29, 2012) (name has been changed to protect the identity of the worker).

³⁰⁵ See Interview 1 (June 24, 2012) (name has been changed to protect the identity of the worker).

³⁰⁶ See Interview 7 (Aug. 24, 2012) (name has been changed to protect the identity of the worker). Another worker reports that their employer rarely covered work-related accidents, so the costs of medical care fall to the worker. See Interview 12 (Aug. 29, 2012) (name has been changed to protect the identity of the worker).

³⁰⁷ *Work Resumes at Lamoille Cnty. Field Days*, OUTDOOR AMUSEMENT BUS. (July 20, 2011), <http://outdooramusementbusiness.com/friedbeer/2011/07/carnival-worker-dies-in-accident-at-vermont-fair-castle-rock-amusements/>.

³⁰⁸ Nathan Burgess, *Investigation Continues in Field Days Death*, STOWE REP. (July 28, 2011), http://www.stowetoday.com/stowe_reporter/news/local_news/article_0a3aa2c8-b923-11e0-b623-001cc4c03286.html?mode=image.

³⁰⁹ *Work Resumes at Lamoille Cnty. Field Days*, *supra* note 307.

³¹⁰ *Id.*

³¹¹ Sarah Cleveland, Beth Lyon, & Rebecca Smith, *The U.S. Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 817 (2003).

³¹² *Id.* at 802-06.

³¹³ See *Workers' Compensation*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/workcomp/index.htm#>. UKAaCoXrFVo (last visited Jan. 27, 2013); see also S. POVERTY L. CTR., *supra* note 22, at 25; *id.*

³¹⁴ Many foreign recruiters have rules on age and gender that dominate their hiring practices; for example, one recruiter openly admitted to not hiring anyone over the age of 40. See *H-2B Guestworkers Facing Rampant Abuse*, HISPANIC NEWS (May 22, 2008), http://www.hispanic8.com/h-2b_guestworkers_facing_rampant_abuse.htm.

³¹⁵ *Id.*

³¹⁶ See S. POVERTY L. CTR., *supra* note 22, at 25.

³¹⁷ See *id.* at 9. In fact, employers recognize that hiring H-2B workers lowers workers' compensation claims and liability insurance. See Ruelas, *supra* note 49.

³¹⁸ See S. POVERTY L. CTR., *supra* note 22, at 26.

³¹⁹ See, e.g., *supra*, Part IV, Workplace Health and Safety Violations and Abuses, *Worker Story: Leonardo*.

³²⁰ See, e.g., *id.*

³²¹ See S. POVERTY L. CTR., *supra* note 22, at 9.

³²² See *id.*

³²³ Cleveland, *supra* note 311, at 819.

³²⁴ See S. POVERTY L. CTR., *supra* note 22, at 26.

³²⁵ H-2B visa holders have 10 days to leave the U.S. after the validity of their H-2B visa petition ends. See FOREIGN AFFAIRS MANUAL, *supra* note 126, at N10.

³²⁶ *The H-2B Program in the U.S.: Hearing Before the Subcomm. On Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 2 (2008) (Statement of Mary Bauer, Director, Immigrant Justice Project, Southern Poverty Law Center); see also S. POVERTY L. CTR., *supra* note 22, at 9.

³²⁷ Interview 5 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

³²⁸ Carmona Aff. ¶ 26, 28, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

³²⁹ See Interview 4 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

³³⁰ See, e.g., Larry Hertz, *State Penalizes Carnival Operator*, POUGHKEEPSIE J. (Sept. 3, 2009) (reporting on a settlement reached between the New York Attorney General and carnival operator Dreamland Amusements Inc. in which Dreamland agreed to ensure that worker housing meet health and safety standards in response to an investigation finding substandard conditions).

³³¹ See 20 C.F.R. § 655.122

³³² See Interview 2 (June 24, 2012); Interview 3 (Aug. 24, 2012); Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 6 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 10 (Aug. 24, 2012); Interview 14 (Aug. 31, 2012); Interview 15, (Sept. 9, 2012); Interview 16 (June/July 2012); Interview 17 (Sept. 16, 2012); Interview 18 (Sept. 16, 2012); Interview 22 (Oct. 20, 2012); Interview 23 (Oct. 20, 2012); Interview 24 (Oct. 20, 2012); see also Eisenstadt, *supra* note 2; Ruelas, *supra* note 49 (noting that workers typically live in “bunkhouse trailer[s] that contain bunk-bed compartments, stacked like a railroad sleeper car, just big enough to sleep in”).

³³³ Interview 15, (Sept. 9, 2012); Interview 16 (June/July 2012); Interview 19 (Sept. 18, 2012); Interview 22 (Oct. 20, 2012).

³³⁴ Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 17, (Sept. 16, 2012); Interview 20 (Sept. 19, 2012); Interview 22 (Oct. 20, 2012); Interview 23 (Oct. 20, 2012).

³³⁵ See Carmona Aff. ¶¶ 22, 28, *In re Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*; Interview 14 (Aug. 31, 2012); Interview 23 (Oct. 20, 2012).

³³⁶ See Interview 4 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 16 (June/July 2012); Interview 17, (Sept. 16, 2012).

³³⁷ Carmona Aff. at ¶ 31, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

³³⁸ Most often, the housing costs and any extra charges for damages were deducted from the pay of H-2B workers interviewed for this report. See Interview 2 (June 24, 2012); Interview 3 (Aug. 24, 2012); Interview 5 (Aug. 24, 2012); Interview 6 (Aug. 24, 2012); Interview 9 (Aug. 24, 2012); Interview 13 (Aug. 31, 2012).

³³⁹ Interview 23 (Oct. 20, 2012) (name has been changed to protect the identity of the worker).

³⁴⁰ Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker).

³⁴¹ See Interview 5 (Aug. 24, 2012).

³⁴² Carmona Aff. ¶ 34, *In re the Investigation of Andrew W. Cuomo, Att’y Gen. of N.Y., of Dreamland Amusements Inc.*

³⁴³ *Id.*

³⁴⁴ 42 U.S.C. § 2000e-2(a)(1) (2001).

³⁴⁵ *Id.*

³⁴⁶ 42 U.S.C. § 2000e(b); Civil Rights Act of 1964, Title VII, §701(b)

³⁴⁷ 42 U.S.C. § 2000e-5(f)(1); *Jasch v. Potter*, 302 F.3d 1092, 1094 (9th Cir. 2002).

³⁴⁸ *Filing a Lawsuit*, U.S. Equal Emp’t Opportunity Comm’n, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Jan. 28, 2013).

³⁴⁹ *Id.*

³⁵⁰ See Interview 6 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

³⁵¹ See Interview 5 (Aug. 24, 2012) (name has been changed to protect the identity of the worker).

³⁵² See Interview 25b (Oct. 25, 2012) (name has been changed to protect the identity of the worker).

³⁵³ See Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038, 10,079 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503).

³⁵⁴ Interview 14 (Aug. 31, 2012) (name has been changed to protect the identity of the worker).

³⁵⁵ Interview 1 (June 24, 2012) (name has been changed to protect the identity of the worker).

³⁵⁶ 8 C.F.R. § 214.2(h)(1)(i) (2013).

³⁵⁷ See Interview 9 (Aug. 24, 2012); Interview 13 (Aug. 31, 2012); Interview 16 (June/July 2012); Interview 20 (Sept. 19, 2012); Interview 25b (Oct. 25, 2012); see also S. POVERTY L. CTR., *supra* note 22, at 16 (describing how fear of retaliation is a “‘deeply rooted’ problem in guestworker programs” whether or not deportation is overtly threatened); Ruelas, *supra* note 49.

³⁵⁸ See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 22.

See Interview 2 (June 24, 2012). See generally S. POVERTY L. CTR., *supra* note 22, at 9.

³⁵⁹ The 2012 H-2B Regulations prohibit blacklisting. See Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,038, 10,158 (Feb. 21, 2012) (to be codified at 29 C.F.R. pt. 503).

³⁶⁰ When one interviewee was asked if other workers might wish to be interviewed, he replied that workers are scared to come forward because they depend on the recruiter for work and do not want to jeopardize their relationship with him. See Interview 16 (June/July 2012) (name has been changed to protect the identity of the worker).

³⁶¹ An H-2B visa-holder has 10 days after the validity of the H-2B petition ends to leave the U.S. See FOREIGN AFFAIRS MANUAL, *supra* note 126, at N10; see also Petition on Labor Law Matters Arising in the U.S. to the National Administrative Office of Mexico under the North American Agreement on Labor Cooperation at 11, ¶ 5 (Sept. 19, 2011) (on file with author).

³⁶² See Interview 9 (Aug. 24, 2012); Interview 13 (Aug. 31, 2012); Interview 19, José (Sept. 18, 2012); Interview 21 (Sept. 22, 2012); Interview 25b (Oct. 25, 2012); see also Cleveland, *supra* note 311, at 802, 806.

³⁶³ See Department of Labor, Obligations of H-2B Employers, 20 C.F.R. § 655.22(f) (2013).

³⁶⁴ Several workers interviewed mentioned their need to send money home to families, though it was not a specific interview question. See Interview 14 (Aug. 31, 2012); Interview 18 (Sept. 16, 2012); Interview 23 (Oct. 20, 2012); Interview 25b (June/July 2012); see also *infra*, Methodology (providing a sample interview questionnaire).

³⁶⁵ See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 116, at 22. See Interview 2 (June 24, 2012); Interview 25b (Oct. 25, 2012); Sieff, *supra* note 69; see also S. POVERTY L. CTR., *supra* note 22, at 31.

³⁶⁶ See NAT’L GUESTWORKER ALLIANCE ET AL., *supra* note 51, at 17.

³⁶⁷ See David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL’Y J. 59, 63-64 (2006) (describing the low-wage workers’ weighing of risks and benefits when deciding whether to complain about working conditions); also S. POVERTY L. CTR., *supra*

note 22, at 31; see also 45 C.F.R. § 1626.6-1626.5 (2013); Interview 5 (Aug. 24, 2012) (name has been changed to protect the identity of the worker) (recounting when he was told he would be sent home if he complained); Interview 25b (Oct. 25, 2012) (name has been changed to protect the identity of the worker).

³⁶⁸ NAT’L GUESTWORKER ALLIANCE ET AL., *supra* note 51 (discussing pervasive guestworker reluctance to report abuse for fear of “losing everything,” even when facing severe exploitation).

³⁶⁹ See *supra*, Part III, Wage and Hour Abuses, *Inadequate Enforcement and Oversight* (describing DOL enforcement efforts).

³⁷⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 51, at 11.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ Many of the workers contacted during data collection for this report declined to discuss their experiences out of fear that employers would trace the information provided to their sources and decline to offer employment in subsequent carnival seasons. See Interview 6 (Aug. 24, 2012); Interview 7 (Aug. 24, 2012); Interview 16 (June/July 2012); Interview 23 (Oct. 20, 2012); see Interview 25a (June/July 2012); see also Interviewer Outreach Report (Sept. 16, 2012, Sept. 29, 2012, Oct. 3, 2012) (on file with authors).

³⁷⁵ See Interviewer Outreach Report (Oct. 3, 2012) (on file with authors).

³⁷⁶ Sebastian worked for the fairs for eight years, until 2010, when he was not invited back. He believes he was not asked to return because he got on the bad side of one of the supervisors. See Interview 12 (Aug. 29, 2012) (name has been changed to protect the identity of the worker).

³⁷⁷ Interview 21 (Sept. 22, 2012) (name has been changed to protect the identity of the worker).

³⁷⁸ See Interview 1 (June 24, 2012) (name has been changed to protect the identity of the worker).

³⁷⁹ See Interview 7 (Aug. 24, 2012) (name has been changed to protect the identity of the worker). Another worker reports that their employer rarely covered work-related accidents, so the costs of medical care fall to the worker. See Interview 12 (Aug. 29, 2012) (name has been changed to protect the identity of the worker).

³⁸⁰ Interview 23 (Oct. 20, 2012) (name has been changed to protect the identity of the worker).

³⁸¹ See Interview 25b (Oct. 25, 2012) (name has been changed to protect the identity of the worker).

³⁸² Interview 16 (Sept. 13, 2012) (name has been changed to protect the identity of the worker).

³⁸³ The labor certification process is codified at 20 C.F.R. § 655, Subpart A.

³⁸⁴ The prevailing wage may be determined in one of two ways. One option is that employers may themselves assess the corresponding prevailing wage amount via the Occupational Information Network (O*NET). See O*NET OnLine, <http://www.onetonline.org> (last visited Jan. 18, 2013). Through the O*NET, the employer or labor contracting agent may determine the appropriate wage level commensurate with the experience and education expected of the employee and the position's level of supervision. Alternatively, an employer or labor-contracting agent can obtain a prevailing wage determination (PWD) from the National Prevailing Wage Center by filing an *Application for Prevailing Wage Determination* (ETA Form 9141). Once issued, a PWD has a validity period of no less than 90 days and no more than one year, and must be valid either on the date recruitment begins or when an *Application for Temporary Employment Certification* (ETA Form 9142) is submitted. See *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

³⁸⁵ Immigration and Nationality Act, 8 U.S.C. § 1182 (2012).

³⁸⁶ DOL defines the prevailing wage rate as "the average wage paid to similarly employed workers in a specific occupation in the area of intended employment." *Prevailing Wages (PERM, H-2B, H-1B, H-1B1 and E-3)*, *supra* note 219; see also *Frequently Asked Questions: Prevailing Wage Determinations through DOL's National Processing Center*, KLASKO, RULON, STOCK & SELTZER, LLP, [http://www.klaskolaw.com/library/files/faqs_prevailing_wage_determinations_through_dols_national_processing_center_\(00835623\).pdf](http://www.klaskolaw.com/library/files/faqs_prevailing_wage_determinations_through_dols_national_processing_center_(00835623).pdf) (last accessed Jan. 28, 2013).

³⁸⁷ DOL collects prevailing wage information by conducting a semi-annual mail survey that collects employment and wage information for approximately 800 occupations. See *Occupational Employment Statistics: Overview*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, http://www.bls.gov/oes/oes_emp.htm (last modified Mar. 27, 2012).

³⁸⁸ *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

³⁸⁹ *Id.*

³⁹⁰ Labor Certification Process for Temporary Non-Agricultural Employment in the U.S. (H-2B Workers), 20 C.F.R. § 655.40(e) (2013). The 2009 Regulations created particular concern about access to positions for U.S. workers because employers advertised temporary low-wage jobs many months before they were available. See *H-2B Program: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 66 (2008) (statement of Ross Eisenbrey, Vice-President, Economic Policy Institute) (noting that H-2B employers in general completed advertising requirements under the previous regulations by advertising up to four or five months prior to the start of work).

³⁹¹ *Id.* (questioning whether local advertising and unequal offers of transportation and housing benefits limit access of U.S. workers to H-2B positions).

³⁹² *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.

³⁹³ *Process for Filing*, *supra* note 121.

³⁹⁴ ETA FORM 9142, *supra* note 83.

³⁹⁵ See ETA FORM 9142, APPENDIX B.1, *supra* note 245.

³⁹⁶ *Process for Filing*, *supra* note 121.

³⁹⁷ See *H-2B Certification for Temporary Non-Agricultural Work*, *supra* note 32.; see also OFFICE OF INSPECTOR GEN., *supra* note 157, at 1.

³⁹⁸ *Process for Filing*, *supra* note 121.

³⁹⁹ See Appendix A: H-2B Labor Certification and Visa Application Process.

⁴⁰⁰ *Process for Filing*, *supra* note 121.

⁴⁰¹ *Id.*

⁴⁰² DHS determines the countries eligible to participate in the H-2B program. The list can be found here: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d1d333e559274210VgnVCM100000082ca60aRCRD&vgnextchan=nel=d1d333e559274210VgnVCM100000082ca60aRCRD#H2-B%20Countries> (last visited Nov. 4, 2012).

⁴⁰³ *Process for Filing*, *supra* note 121; see also U.S. CITIZENSHIP AND NATURALIZATION SERV., DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR FORM I-129, PETITION FOR A NONIMMIGRANT WORKER, 9-10 (2013), <http://www.uscis.gov/files/form/i-129instr.pdf>.

⁴⁰⁴ INSTRUCTIONS FOR FORM I-129, *supra* note 403, at 9-10.

⁴⁰⁵ *Id.* The charging of a recruitment fee as a condition of employment is prohibited. See FOREIGN AFFAIRS MANUAL, *supra* note 126, at N2.2.

⁴⁰⁶ INSTRUCTIONS FOR FORM I-129, *supra* note 403, at 9-10.

⁴⁰⁷ *H-2B Temporary Non-Agricultural Workers: H-2B Eligible Countries List* (2013), U.S. CITIZENSHIP AND IMMIGRATION SERV., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d1d333e559274210VgnVCM100000082ca60aRCRD&vgnextchan=nel=d1d333e559274210VgnVCM100000082ca60aRCRD#H2-B%20Countries> (last updated Jan. 18, 2013).

⁴⁰⁸ *Process for Filing*, *supra* note 121.

⁴⁰⁹ *Fees for Visa Services*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1263.html (last visited Jan. 28, 2013).

⁴¹⁰ *Temporary Worker Visas*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1271.html (last visited Jan. 28, 2013).

- ⁴¹¹ *DS-160: Online Nonimmigrant Visa Application*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/visa/forms/forms_4230.html (last visited Jan. 28, 2013).
- ⁴¹² FOREIGN AFFAIRS MANUAL, *supra* note 126, at N2.2.
- ⁴¹³ *Temporary Worker Visas*, *supra* note 410. Consular officers are advised that a “large majority of approved H petitions are valid” and are instructed to refer H petitions to USCIS for reconsideration only *sparingly*. See FOREIGN AFFAIRS MANUAL, *supra* note 126, at N2.3.
- ⁴¹⁴ *DS-160: Online Nonimmigrant Visa Application*, *supra* note 411.
- ⁴¹⁵ *Rights and Protections for Temporary Workers*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/pamphlet/pamphlet_4578.html (last visited Jan. 28, 2013).
- ⁴¹⁶ *Group Processing*, OFFICIAL VISA SERV. OF THE U.S. OF AMERICA: MEXICO, http://usvisa-info.com/en-MX/selfservice/us_group_processing (last visited Jan. 28, 2013).
- ⁴¹⁷ *OFLC Case Disclosure Data*, *supra* note 48.
- ⁴¹⁸ ALPINE AMUSEMENT CO., <http://www.alpineamusements.com/> (last visited Jan. 17, 2013).
- ⁴¹⁹ *2012 Schedule*, BATES BROTHERS AMUSEMENT CO., <http://www.batesbros.com/Schedule.html> (last visited Jan. 17, 2013) (The fair is divided into two different units, “Michelle’s Unit” and “Amy’s Unit,” and the two units meet up to work larger fairs and carnivals.).
- ⁴²⁰ BIG O AMUSEMENTS, <http://www.bigoamusements.com/> (last visited Jan. 17, 2013) (During the summer months, the company operates in the northern U.S. and during the winter months, it operates in the southern U.S.).
- ⁴²¹ *About Us*, BIG ROCK, <http://bigrockamusements.com/about-us.asp> (last visited Jan. 17, 2013).
- ⁴²² *2012 Fairs & Festivals Schedule*, BUTLER AMUSEMENTS, INC., <http://www.butleramusements.com/fairs.php> (last visited Jan. 17, 2013).
- ⁴²³ *More About Us*, CASEY’S RIDES, <http://www.caseysridesinc.com/more.htm> (last visited Jan. 17, 2013) (Casey’s Rides operates mostly in Kentucky, however, it has been known to operate in Tennessee.).
- ⁴²⁴ CITY OF FUN CARNIVAL, <http://www.cityoffuncarnival.com/> (last visited Jan. 17, 2013).
- ⁴²⁵ COWBOY ATTRACTIONS, <http://cowboyattractions.webspawner.com/> (last visited Jan. 17, 2013).
- ⁴²⁶ DEGGELLER ATTRACTIONS, INC., <http://www.deggeller.com/deggeller/index.asp> (last visited Jan. 17, 2013).
- ⁴²⁷ *Elliot’s Amusements Fairs and Events*, ELLIOTT’S AMUSEMENTS, <http://www.elliottsamusements.com/events/events.asp> (last visited Jan. 17, 2013).
- ⁴²⁸ FANTASY AMUSEMENT CO., http://fantasyamusements.com/wordpress/?page_id=21 (last visited Jan. 17, 2013).
- ⁴²⁹ EK FERNANDEZ SHOWS, <http://www.ekfernandez.com/index.asp> (last visited Jan. 17, 2013).
- ⁴³⁰ *Bookings*, CUMBERLAND VALLEY SHOWS, <http://www.cumberlandvalleyshows.com/booking/booking.asp> (last visited Jan. 17, 2013).
- ⁴³¹ *The History of Jolly Shows*, JOLLY SHOWS, <http://www.jollyshowscarnivals.com/history.htm> (last visited Jan. 17, 2013).
- ⁴³² *2012 Event Schedule*, GILLETTE SHOWS, <http://www.gillette-shows.biz/schedule.htm> (last visited Jan. 17, 2013).
- ⁴³³ *Booking Information*, GOLD MEDAL SHOWS, <http://www.goldmedalshows.com/booking.html> (last visited Jan. 17, 2013) (hover mouse cursor over the “Home” tab at the top of the page for a dropdown list of the Fair and Carnivals on Gold Medal Shows’ route).
- ⁴³⁴ GS SHOWS, <http://www.thefuncarnival.com/gs/index.asp> (last visited Jan. 17, 2013).
- ⁴³⁵ MAJESTIC MIDWAY, <http://www.majesticmidways.com/default.aspx> (last visited Jan. 17, 2013).
- ⁴³⁶ *About Us*, SWARTWOOD AMUSEMENT CO., <http://www.swartwoodamusementco.com/about.html> (last visited Jan. 17, 2013) (Operates mostly in Southern California).
- ⁴³⁷ *Kissel Tour*, KISSEL ENTMT, <http://www.kisselentertainment.com/#/kissel%20tour> (last visited Jan. 17, 2013).
- ⁴³⁸ *About Us*, MIDWAY RIDES OF UTICA, http://www.midwayridesofutica.com/about_us.htm (last visited Jan. 17, 2013).
- ⁴³⁹ *About Us*, MITCHELL BROS. AND SONS, <http://www.mitchell-brothersamusements.com/about.php> (last visited Jan. 17, 2013).
- ⁴⁴⁰ *Fairs, Festivals, and Events*, MURRAY BROS., <http://www.murraybrothersinc.com/booking/events.asp> (last visited Jan. 17, 2013).
- ⁴⁴¹ *Myers Internationals Midways 2012 Schedule*, MYERS INT’L MIDWAYS, <http://www.myersmidways.com/fairlist.htm> (last visited Jan. 17, 2013) (The fair is divided into two different units, the “Blue Unit” and “Gold Unit,” and the two units meet up to work larger fairs and carnivals).
- ⁴⁴² *Fairs & Events – Archive*, N. AM. MIDWAY ENTMT, <http://www.namidway.com/fairs-events/categoriesdetailed/archive> (last visited Jan 17, 2013) (on file with author).
- ⁴⁴³ *Schedule*, OTTOWAY AMUSEMENT CO., <http://ottawayamusements.com/schedule/> (last visited Jan. 17, 2013).
- ⁴⁴⁴ PBJ HAPPEE DAYS SHOWS, <http://www.pbjshows.com/> (last visited Jan. 17, 2013).
- ⁴⁴⁵ *About Us*, PEACHTREE RIDES, <http://www.peachtreerides.com/About%20Us/about.html> (last visited Jan. 17, 2012).
- ⁴⁴⁶ PLAYWORLD AMUSEMENTS, <http://www.playworldamusements.com/> (last visited Jan. 17, 2013).

⁴⁴⁷ RCS, <http://www.rcsfun.com/> (last visited Jan. 17, 2013) (follow the “Buy Tix” tab; then hover mouse cursor over “Fair Directory” tab for a dropdown list of the Fairs and Carnivals on RCS’ route).

⁴⁴⁸ REITHOFFER SHOWS, *supra* note 103.

⁴⁴⁹ *Rockwell Amusements 2012 Fair Schedule*, ROCKWELL AMUSEMENTS, <http://www.rockwellamusements.com/fairs.htm> (last visited Jan. 17, 2013).

⁴⁵⁰ *Where We Are*, S & S AMUSEMENTS, <http://www.sandsa-musementspa.com/whereweare.html> (last visited Jan. 17, 2013).

⁴⁵¹ *About Us*, SAM’S AMUSEMENTS & CARNIVAL, <http://www.samscarnival.com/page3/page3.html> (last visited Jan. 17, 2013).

⁴⁵² *Schedule*, SMOKEY’S GREATER SHOWS, <http://www.smokeys-greatershows.com/events/> (last visited Jan. 17, 2013).

⁴⁵³ *2012 Route*, STRATES SHOWS, http://www.strates.com/event_schedule.htm (last visited Jan. 17, 2013).

⁴⁵⁴ *Operations*, SUN VALLEY RIDES, LLC., <http://www.sunvalley-rides.com/operations.html> (last visited Jan. 17, 2013).

⁴⁵⁵ *Swank’s Spectacular Midway*, SWANK’S STEEL CITY SHOWS, <http://www.swanksteelcityshows.com/midway.htm> (last visited Jan. 17, 2013).

⁴⁵⁶ *Links*, SWYEAR AMUSEMENTS, INC., <http://www.swyearamusements.com/about/links.asp> (last visited Jan. 17, 2013).

⁴⁵⁷ TAS, INC., <http://www.armstrongshows.com/> (last visited Jan. 17, 2013).

⁴⁵⁸ *Route: 2012 Season*, MIGHTY THOMAS CARNIVAL, <http://www.thomascarnival.com/route.htm> (last visited Jan. 17, 2013).

⁴⁵⁹ *Fairs & Festivals*, MILLER AMUSEMENTS, <http://www.millera-musements.com/fairs.html> (last visited Jan. 17, 2013).

⁴⁶⁰ *Visit Us at One of Our Great Events*, WADE SHOWS, INC., <http://www.wadeshows.com/events.asp> (last visited Jan. 17, 2013).

⁴⁶¹ WAGNER’S CARNIVAL, <http://www.wagnerscarnival.com/Pages/default.aspx> (last visited Jan. 17, 2013).

⁴⁶² *Fairs, Festivals, and Carnivals*, WOOD ENTMT’G CO., INC., <http://www.woodentco.com/events/events.asp> (last visited Jan. 17, 2013).

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